82-1436

No. A-559
IN THE

Supreme Court of the United States

October Term, 1982

CITY OF TORRANCE,

Appellant,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STATE COMPENSATION INSURANCE FUND,

Appellees.

JURISDICTIONAL STATEMENT.

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Questions Presented.

1. Whether, after the City of Torrance had paid for insurance covering all injuries suffered by its employees, a statute which makes such insurance agreements unenforceable constitutes an unconstitutional impairment of contract in violation of the contract clause of the United States Constitution. U.S. Const. Art. I, § 10.
2. Whether a court, in assessing the constitutionality of legislation impairing contracts to which the State is a party, should apply a stricter standard of review than where the impaired contract is between private parties.

Parties to the Proceeding.

Appellant is the City of Torrance, California. Appellees are two state agencies, Workers' Compensation Appeals Board of the State of California and State Compensation Insurance Fund.

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JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

In the Appendix filed concurrently with this Jurisdictional Statement[1] appear the opinions of the California Supreme Court reported at 32 Cal. 3d 371, 185 Cal. Rptr. 645 (App. 4 *et seq.*), the California Court of Appeal (App. 26 *et seq.*) and the Workers' Compensation Appeals Board. (App. 38 *et seq.*).

GROUNDS ON WHICH JURISDICTION IS INVOKED.

1. *Nature of the Proceeding.* California has established a state monopoly for selling insurance to public entities. Public agencies may purchase insurance only from State Compensation Insurance Fund (State Fund). The only alternative for the public agency is to be self-insured. State

[1]Citations herein to material printed in the Appendix appear as "App."

Fund, under its agreements with the City of Torrance (City), specifically agreed to pay ". . . any sums due for compensation for injuries . . . for which the Insured is liable." (App. 33).

In the case at bar, after State Fund received premiums from numerous public entities such as City, the Legislature abrogated State Fund's obligation to pay insurance benefits for victims of cumulative trauma. That obligation was shifted to self-insured employers previously insured by State Fund. City, however, had paid more than $1.5 million in premiums for State Fund's promise of such insurance coverage.

In 1978, the heirs of a City employee, Kenneth Atkinson, whose death was caused by a work-related injury sued it and State Fund. The employee had worked for City for a 21-year period (from 1956 to 1977) and sustained a cumulative trauma while in its employ. For 15 of those 21 years, State Fund had insured City against such claims. Thereafter, the City was permissibly self-insured.

In early 1978, City settled the claim with the employee's heir and sought a proportionate contribution of 72 percent (15/21) from State Fund pursuant to its insurance contracts. State Fund refused to pay. Instead, it moved to dismiss the City's claim before the Workers' Compensation Judge based upon recent legislation which abrogated State Fund's contractual duty to pay.

State Fund conceded that but for the legislation, it had an unqualified duty under its insurance contracts to contribute to the settlement. *City of Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal. 3d 371, 376, 185 Cal. Rptr. 645, 647 (1982). (App. 8-9). City opposed State Fund's motion on the basis the statute unconstitutionally impaired its insurance contracts.

The Workers' Compensation Judge held the statute unconstitutional as applied to City's insurance policies. Upon review, the Workers' Compensation Appeals Board re-

versed. Over dissent, a majority of the California Supreme Court (and earlier, the California Court of Appeal) affirmed the WCAB decision. The majority found that despite City's payment of premiums for insurance coverage, its contracts were not impaired by the legislation. City appeals from that decision of the California Supreme Court.

2. *The judgment sought to be reviewed* is dated September 13, 1982, and is embodied in the published opinion of the California Supreme Court reported at 32 Cal. 3d 371, 185 Cal. Rptr. 645 (App. 4 *et seq.*). The California Supreme Court denied City's petition for rehearing on October 13, 1982. (App. 2). The notice of appeal to this Court was filed on December 20, 1982. (App. 2). Appellant was granted an extension of time by this Court until February 26, 1983 to file its jurisdictional statement. (App. 1).

3. *The statutory provision believed to confer jurisdiction of the appeal to this Court is* 28 United States Code Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Article I, Section 10: "No State shall . . . pass any . . . Law impairing the obligation of Contracts."

California Labor Code Section 5500.5(a) (Deering 1982) (effective January 1, 1978):

> "[L]iability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury . . . or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next

two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

For claims filed or asserted on or after	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year"

* * *

"If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining such liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment."

That amendment repealed Labor Code Section 5500.5(d) which had provided that:

"(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurers who insure the workers' compensation liability of such employer during the entire period of the employee's exposure with such employer, or its predecessors in interest. The respective contributions of such insurers shall be in proportion to employment during

their respective periods of coverage. As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured."

STATEMENT OF THE CASE.

Appellant City of Torrance (City) is a California city with a population of 138,000. It employs approximately 1,200 people. Like numerous other public entities, City purchased insurance coverage from the State Compensation Insurance Fund (State Fund) for many years.[2] Only State Fund may sell insurance to public entities in California.[3]

State Fund agreed to pay for all injuries, including cumulative trauma, sustained by City's employees:

> "State . . . Fund . . . does hereby agree . . . (1) to pay promptly and directly to any person entitled thereto . . . *any sums due for compensation for injuries* . . . [and] *to pay the compensation*, if any, *for which the Insured is liable*." (App. 33) [emphasis added].

In return for State Fund's promise to provide coverage for which the City "is liable", City paid State Fund more than $1.5 million in premiums during the period of Atkinson's employment. Other public entities paid for identical insurance coverage.

City had employed Atkinson as a fireman from 1956 to 1977. After his death from cancer in 1978, his daughter sued City and its insurer, State Fund, for compensation

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[2]On July 1, 1971, City became legally self-insured pursuant to Labor Code Section 3900.

[3]The State Fund was established by California Constitutional mandate. State Fund's Board of Directors is composed of the State Director of Industrial Relations and four others appointed by the Governor of California. Cal. Ins. Co. § 11770. Employees of State Fund are civil servants. State Fund is authorized to receive specific appropriations from the legislature. Cal. Ins. C. § 11773. The State Treasurer serves as custodian for all monies and securities belonging to State Fund (Cal. Ins. C. § 11788) and the Board of Directors is required to invest all surplus monies. Cal. Ins. C. § 11797.

benefits. Atkinson's death was alleged to have resulted from a cumulative trauma developed during 1956 to 1977, the 21 year period Atkinson worked for City.

A. Cumulative Trauma.

Cumulative injury was recognized as compensable in California long before any of the insurance contracts between City and State Fund were written. A cumulative trauma or injury is statutorily defined as an injury "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." Cal. Labor Code § 3208.1. Typical claims involve repeated exposure to such external agents as chemicals or cumulative internal effects such as tension or stress-related illness.

As recognized by the California Legislature when considering passage of the legislation at issue, the concept of cumulative trauma is well known to employers and insurance carriers, including State Fund. Benefits have been awarded to employees for cumulative trauma since 1918. Cal. Assem. Com. on Finance, Insurance, and Commerce, Interim Hgs. (January 12 and 19, 1977), p. 45. For three decades, California appellate decisions have similarly held that cumulative trauma is compensable. *See, e.g., Lumbermen's Mutual Casualty Co. v. Industrial Accident Comm'n*, 29 Cal. 2d 492, 175 P.2d 823 (1945); *Fireman's Fund Indem. Co. v. Industrial Accident Comm'n*, 39 Cal. 2d 831, 250 P.2d 148 (1952).

To cover cumulative trauma claims, State Fund was required to establish reserves out of premiums paid by City and its other insureds. Such reserves recognize the lengthy period of time associated with the filing of cumulative trauma claims. Until the daily micro-trauma results in a compensable injury, the premiums are placed into reserves for "incurred but not reported injuries." Until the claim is paid from the reserve, State Fund is permitted to earn income

on these reserves. Cal. Ins. Code § 11797. State Fund presently holds $70 million in a contingency reserve (awaiting upon the outcome of this and another lawsuit). State Fund Annual Report, 1981, p. 15 n. 4.

B. The History of Labor Code Section 5500.5.

City entered into its insurance contracts with and paid its premiums to State Fund against a background of a quarter century of legislative recognition of the insurability of cumulative trauma.

In 1951, the California Legislature enacted Labor Code Section 5500.5 providing that an employee suffering a cumulative injury could recover against any employer whose employment contributed to the disease or injury. The employer (or its insurer) could then seek contribution from other employers (and their insurers) for the portions for which they were responsible. Section 5500.5 was determined to cover cumulative injury by case law. *See e.g., Fireman's Fund Indem. Co. v. Ind. Acc. Com.*, (1952) 39 Cal. 2d 831, 835, 250 P.2d 148.

In 1973, the Legislature amended Section 5500.5 to expressly cover cumulative injury claims. Although the statute was amended in several respects not pertinent here, subdivision (d) of Section 5500.5 provided that if an employee was employed by the same employer for more than five years during which he was exposed to the hazard which caused his injury, all insurers of the employer during his employment would be liable. Subdivision (d) was popularly known as the "single employer exception." (Quoted at p. 4, *supra*).

In 1977, the Legislature amended Labor Code Section 5500.5 to repeal the "single employer exception" effective January 1, 1978. The constitutionality of this latest amendment is the subject of this appeal.[4] (Quoted at 3-4, *supra*).

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[4]The 1977 amendment is made applicable to all claims filed on or after January 1, 1978. Atkinson's heir's claim for death benefits was filed April 10, 1978.

State Fund conceded that but for the 1977 amendment, State Fund would have been required under its insurance contracts to pay 72 percent (15/21) of the settlement amount. (App. 8-9). This amount is based upon the number of years Atkinson worked for City during which State Fund was City's insurer. Relying upon the 1977 amendment, however, State Fund refused to pay any part of the settlement despite its unqualified contractual obligation to do so. It, furthermore, kept all the premiums and the cash reserves set aside for such claims.

C. Proceedings Below.

After settling the claim, City sought contribution under its insurance agreement from State Fund before the California Workers' Compensation Appeals Board. State Fund moved to dismiss on the sole basis that it was not obliged to honor its contractual commitments after passage of the 1977 amendment to Labor Code Section 5500.5.

City opposed the request for dismissal on grounds that the 1977 amendment unconstitutionally impairs the insurance contracts at issue. The Workers' Compensation Judge determined the statute to be unconstitutional. (App. 56-57). Moreover, the judge found untenable the justification advanced for the statute — that it eliminated administrative confusion as to the number of parties joined in a compensation proceeding. Since the State law precludes public agencies from obtaining insurance from sources other than State Fund, the maximum number of defendants involved would be only two, an insignificant basis for eliminating City's expectation of insurance coverage. (App. 57).

On appeal, the Workers Compensation Appeals Board reversed. In doing so, the Board did not discuss a single constitutional issue presented. (App. 38 *et seq.*). City sought review before the Court of Appeal which ruled in favor of State Fund on October 27, 1981. Similar to the Board, the court, in upholding the legislation, did not discuss a single

case regarding the contract clause of the United States Constitution. (App. 26 *et seq.*).

On petition for hearing before the California Supreme Court, City again urged that the 1977 amendment to Labor Code Section 5500.5 unconstitutionally impaired City's contracts of insurance with State Fund. That impairment, it contended, violated the contract clauses of the United States and California Constitutions.

In upholding the legislation, the Supreme Court did not explain how avoidance of responsibilities by State Fund was consistant with City's reasonable expectations that State Fund would honor its express obligation to pay "any sums . . . for which the Insured is liable." (App. 33). Despite City's payment of insurance premiums to State Fund, City will still be liable to pay its employees injured by cumulative trauma. The California Supreme Court concluded that "the *only* obligation State Fund assumed [under the contracts] was the obligation to pay what the Workers' Compensation law required." 32 Cal. 3d at 378, 185 Cal. Rptr. at 649. (App. 11-12). In so stating, the court confused the issues. The employer-employee relationship, the City agreed, might be affected as to the scale of benefits provided to injured workers. The City, however, had not agreed to accept changes in State Fund-City relationship. Based upon the limited incorporation of the scale of employee benefits which could be modified, the court erroneously reasoned that City agreed to be bound by *all* changes in the law which might affect the insurance agreement, including total ab-

rogation of State Fund's responsibilities.[5] Therefore, the court determined City had no legitimate contractual expectation that it would continue to be covered by State Fund for those years for which City had paid premiums. 32 Cal. 3d at 379-380. (App. 13-14).

In approving the legislative abrogation of the contractual rights of City and all other public entities, the majority of the California Supreme Court ignored the controlling authority of *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, *reh'g denied*, 431 U.S. 975, 97 S.Ct. 2942 (1977) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, *reh'g denied*, 439 U.S. 886, 99 S.Ct. 233 (1978). Those decisions indicate that no deference should be given a state legislative determination that a statute is reasonable and necessary to achieve a legitimate state goal if the State is a party to the impaired contract. Instead, the majority relied upon inapposite California cases. 32 Cal. 3d at 383-384, 185 Cal. Rptr. at 651-52. (Mosk, J. dissenting). (App. 19). Contrary to constitutional mandates, the majority gave total deference to the California Legislature's determination that the statute was reasonable and necessary to achieve a legitimate goal.

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[5]The California Supreme Court focused upon the undoubted fact that the City and State Fund agreed to be bound by changes in compensation benefits. For example, weekly maximum temporary disability rates were changed from $154 per week to $175 in 1981. That such a modification was contemplated by the parties was also conceded at oral argument. (App. 51). Unfortunately, the California Supreme Court used this limited amount of permissible change as the predicate for the conclusion that the parties agreed to accept *all* changes in the law (32 Cal. 3d at 378, 185 Cal. Rptr. at 649). In reaching that conclusion the court ignored the principle that "a promise to pay, with a reserved right to deny or change the effect of the promise is an absurdity." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 1519 n. 23 (1977).

The state court has also rejected City's efforts to clarify the issue as to what it had conceded as to the nature of the contract. It has not permitted a certified short hand reporter access to the tape recording of the oral argument. (App. 50). Moreover, it has rejected City's attempts to obtain reconsideration and rehearing. (App. 51).

SUBSTANTIALITY OF FEDERAL QUESTIONS.

The issues presented here are critically important to every city, county, school district and other political subdivision of California.[6] State law requires every political subdivision to contract with State Fund — an arm of the State — for insurance against liability arising from work-related injuries or be self-insured. Cal. Labor Code § 3900. No political subdivision may obtain insurance from a privately owned insurer. *Id.* Consequently, numerous political subdivisions of the State — like City — entered into bargained-for contracts with State Fund and paid premiums to State Fund in reliance upon its promise to pay benefits under contracts of insurance.

Both the money paid in premiums and shifts in liability made by the statute are substantial. City alone paid $1.5 million in premiums for such insurance. The Legislature initially predicted that the legislation would shift $52.7 million in liability from State Fund to employers of injured workmen. Assem. Comm. on Finance, Insurance and Commerce, Interim Hgs. on Assem. Bill No. 155 (April 27, 1977). State Fund now admits that it will retain approximately $70 million if permitted to avoid honoring its contractual obligations in this and another pending action. Annual Report, 1981, p. 14, n. 4.

This legislation is particularly pernicious since it permits State Fund to retain the premiums as well as monies earned through investment of those premiums. Moreover, although State Fund has set aside many millions of dollars in reserves to cover projected liability for these claims, the abrogation

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[6]One test for measuring concern about the enforceability of the State Fund's unqualified obligation to pay, as stated in the insuring agreements, "compensation, if any, for which the Insured is liable" is the number of amicus curiae briefs filed in the state courts. Separate briefs were filed by County of Los Angeles, California Workers' Compensation Institute, California Self-Insurers Association, Council of Self-Insured Public Agencies, City of Sacramento, and Industrial Indemnity Co.

of its contractual obligation does not provide the insureds any recoupment of those reserves.

The legislation is contrary to the expectations of California public agencies as to State's Fund's obligation to pay for workers' injuries. The 1977 amendment to Section 5500.5 has resulted in a sudden, unanticipated, permanent and substantial shift in liability to City and similar entities. Simultaneously, it provides an unjustified windfall gain to State Fund.

The impact of this amendment is not limited to financial difficulties for public entities. All injured public employees must rely solely upon their employer for payment of insurance benefits. Necessarily, if a public entity paid premiums to State Fund for insurance, it did not set aside reserves (as State Fund did) to cover cumulative injuries. As a result, the required funds are simply not available to cover this unexpected liability.[7]

These issues of contractual obligation are of particular significance because the State is a party to the contracts at issue. If the State is permitted to unilaterally repudiate its obligations, the public's confidence in the State's good faith compliance with its agreements will be irreparably undermined. Such a precedent would have the far-reaching effect of placing every person on notice that all agreements with the State of California may be repudiated. As demonstrated by the instant case, not even the public (through such entities

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[7]For example, during the January 12 and 19, 1977 Interim Hearings of the Assembly Committee on Finance, Insurance, and Commerce, a representative of the Los Angeles Unified School District, an organization of 76,000 employees, explained to the legislative committee that because of taxing limitations that apply to the districts, the school districts will be unable to pass this sudden increase in liability on the taxpayers. Therefore, "less funds will be available [to the school districts] to maintain even the present level of education." Assem. Com. on Finance, Insurance, and Commerce, Interim. Hgs. on Assem. Bill No. 155 (Jan. 12 and 19, 1977) p. 328.

as the City of Torrance) can rely upon the State to honor its obligations.

Finally, the necessity for this Court's intervention is highlighted by the difference between the California Supreme Court and the Ninth Circuit Court of Appeals in determining the proper standard for review of legislation impairing a contract to which the State is a party. On the one hand, the Ninth Circuit in *Continental Illinois National Bank v. Washington*, No. CA. 82-3404 (9th Cir. Jan. 11, 1983) considered the constitutionality of legislation placing new restraints on the sale of municipal bonds. Because the State was a party to the contracts which were impaired, the Ninth Circuit held that the Constitution required a stricter scrutiny to determine whether the legislation was constitutional than if the contracts had been solely between private parties *Id.* at 17. In contrast, in the case here on appeal, although the State of California is a party to the contracts at issue, the majority of the California Supreme Court ignored the State's role as a contracting party. Accordingly, the present conflict poses grave uncertainty as to the proper degree of deference to be afforded legislative determinations which result in impairment of State's contracts.

POINT 1.

CALIFORNIA LABOR CODE SECTION 5500.5 UNCONSTITUTIONALLY IMPAIRS THE CITY'S INSURANCE CONTRACTS IN VIOLATION OF THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION.

1. The Impairment.

The direct purpose and intended effect of the legislation at issue is the total abrogation of vested contract rights.[8] There is no dispute that but for the 1977 amendment, State Fund was contractually obligated to pay 72 percent of the settlement amount to Atkinson's heir under the contracts with City. State Fund has so conceded. *City of Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal. 3d 371, 376, 185 Cal. Rptr. 645, 647 (1982). (App. 8-9). The legislation did not impair duties incidental to the contracts. Rather, State Fund's promise to pay all claims was the primary consideration for City entering into the contracts.[9] In return for $1.5 million paid by City in premiums, State Fund agreed: "to pay promptly and directly to any person entitled thereto under the Work[ers'] Compensation Laws . . ., any sums due for compensation . . . for which the [City] is liable. . . ." City's contractual right to benefit from State Fund's

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[8]"A legislative committee report on the effect of the 1977 amendment notes that if an employer [like City] has recently become self-insured, he may be fully liable for the payment of benefits for cumulative injury without being able to turn to a prior insurer for contribution in cases where the single employer exception applies. . . . The exact amount [of the financial amount involved in this shift] . . . is not known but it has been estimated by the insurance industry to be approximately $52.7 million for the period 1978 through 1981 . . . The greatest fiscal impact appears to be on those public agencies who were formerly covered by the State [Fund]." *City of Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal. 3d 37 at 381-82, 185 Cal. Rptr. 645 at 650 (quoting Assem. Com. on Finance, Insurance and Commerce, Interim Hgs. on Assem. Bill No. 155 (April 27, 1977) p. 4).

[9]Compare *El Paso v. Simmons*, 379 U.S. 497, 514, 85 S.Ct. 577, *reh'g denied*, 380 U.S. 926, 85 S.Ct. 879 (1965) (reinstatement provision was a peripheral element of the contract at the time the buyers first acquired the land and had not substantially induced the original buyers to acquire the land).

undertaking was fully vested when the statute was passed. City's *sole* benefit under the contracts — State Fund's duty to pay — is rendered valueless as a result of the legislation.

Despite the severe, permanent effect of the amendment's impact upon State Fund's obligation to pay claims, the California Supreme Court erroneously concluded that the legislation did not impair City's contractual rights. The court reasoned that because workers' compensation is subject to State regulation, the parties agreed to be bound by *all* subsequent changes in the workers' compensation laws, including those statutory provisions which were directed to insurance contracts between employers and their insurance carriers. 32 Cal. 3d at 379-80, 185 Cal. Rptr. at 648-49. This contention is unsupportable in fact or logic.

First, the contract language does not support the court's reasoning. State Fund agreed to "pay any sums due for compensation . . . for which the [City] is liable. . . ." In return for this unqualified promise to satisfy such claims, City paid substantial premiums. It is ludicrous to suggest that City or any other public entity, would enter into insurance contracts and pay $1.5 million in premiums to State Fund knowing that the State could unilaterally terminate its contractual duties. After the legislation, City remains liable for such claims. To suggest that a total abrogation of insurance benefits was within the parties' expectations is to deny that a legally binding contract ever existed. "A promise in a contract that gives one party the power 'to deny or change the effect of the promise, is an absurdity.' " *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 n. 23 (quoting *Murray v. Charleston*, 96 U.S. 432 at 445 (1978)).

Second, although state regulation may impact the level of compensation benefits granted to workers, such regulation does not grant authority to the State to abrogate the obligation of insurance carriers to their insureds. One of the primary purposes of the contract clause was to protect the vested, contractual rights of individuals from State inter-

ference. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427, 54 S.Ct. 231 (1934); *Id.* at 454-64 (dissent). Here, the City had a vested right to insurance coverage. The State's regulation of compensation benefits to employees does not justify the abrogation of State Fund's contractual duties to the employer. The limitations upon State action imposed by the contract clause cannot be voided merely because the contracts touch upon an area subject to regulation.

At best, State regulation of the subject matter of the contract is only one factor to be considered when determining whether an impairment exists. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 51 U.S.L.W. 4105, 4109 (1983). Moreover, prior regulation alone is insufficient to justify abrogation of contract rights. Instead, it is the *nature* or *type* of regulation that determines the foreseeability and, therefore, the reasonableness of the legislation. *Continental Illinois Nat'l Bank v. Washington*, No. CA 82-3404, slip op. at 20 (9th Cir. Jan. 11, 1983). For example, in *Energy Reserves Group, Inc. v. Kansas Power and Light Co., supra*, this Court recently upheld a Kansas statute imposing price controls on natural gas sold in the intrastate market. Since price regulation existed when the parties entered into the contract, this court held that the Kansas price controls were of the *type* of legislative change that was foreseeable to the parties. 51 U.S.L.W. at 4110. *See also Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38, 60 S.Ct. 792 (1940) (withdrawal rights of shareholders previously regulated by state; shareholder's rights may be further affected since "he purchased subject to further regulation on the same topic").

Simply put, unlike *Energy Reserves, supra*, and *Veix*, the State's total abrogation of City's vested right to indemnification under its contracts of insurance was not the *type* of legislation that was reasonably foreseeable to City when it entered into the contracts. Even if changes in levels of

benefits was foreseeable, the total abrogation of the State Fund's obligation to make payments (and the shifting of such costs to the City) was not. If the contract clause is to retain any meaning whatsoever, the power of the State "must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation. . . ." *Blaisdell*, 290 U.S. at 416. Based upon the foregoing, appellant submits that the California court erroneously determined that the legislation resulted in no contractual impairment.

2. Severity of the Impairment.

The severity of the contract impairment determines the level of scrutiny to which the legislation will be subjected under the contract clause. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245, 98 S.Ct. 2716, 2722-23 (1978); *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 51 U.S.L.W. 4106, 4108-09 (1983). The heart of the insurance contracts at issue have been eviscerated by the 1977 amendment. This total abrogation of contractual obligations was both unexpected and unforeseeable. It is difficult to conceive of an impairment more severely affecting City's contracts with State Fund than failure to pay claims under an insurance policy. *Cf. Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716 (modification of pension plan found to be substantial because of the added financial burden); *see United States Trust Co. v. New Jersey*, 432 U.S. 1, 26-27, 97 S.Ct. 1505 (total destruction of contractual expectations is not necessary for a finding of substantial impairment). Where, as here, the impairment is substantial, "[t]he presumption favoring 'legislative judgment as to the necessity and reasonableness of the particular measure,' [citation] simply cannot stand . . . ." *Allied Structural Steel*, 438 U.S. at 247 (quoting *United States Trust*, 431 U.S. 1, 23).

(a) Reasonableness and Necessity of Impairment.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716 (1978), this Court identified six factors to be assessed in determining whether legislation is justified:[10] (1) whether the law was enacted in response to an emergency; (2) whether the relief provided by the statute was properly tailored to the emergency; (3) whether the statute imposed reasonable conditions; (4) whether the legislation is limited to the duration of the emergency; (5) whether it is directed toward a basic societal interest as opposed to a narrow, particularized interest; and, (6) the degree to which the subject matter has previously been regulated. *Id.* at 242. Those criteria, however, have not been satisfied in the case of an appeal.

The facts in *Allied, supra*, illustrate the application of these factors. In 1974, Minnesota enacted the Private Pension Benefits Protection Act (the Act). All employers with over 100 employees and which provided a pension plan were subject to the Act. The Act provided any employer going out of business or closing its Minnesota office would be subject to a pension fund charge if the assets in the pension plan were not sufficient to provide full pension for all employees who had worked ten or more years. *Id.* at 238.

Allied Structural Steel Co. (the Employer) maintained an office in Minnesota. In 1963, the Employer voluntarily adopted a pension plan but retained the right to modify or terminate the plan. The unqualified right of the Employer to terminate the plan became the focal point of the litigation.

After the Act was passed, the Employer closed its Minnesota office. Based upon the Act, Minnesota imposed a

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[10]The first five of these factors were borrowed from this Court's earlier decision in *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 298, 54 S.Ct. 231 (1934). The sixth appears to have originated in *Veix v. Sixth Ward Bldg. & Loan Ass'n.*, 310 U.S. 32, 60 S.Ct. 792 (1940) discussed at page 16 of this brief.

pension funding charge of $185,000 on the Employer, despite its right to modify or terminate the plan. The Employer challenged the statute as an unconstitutional violation of the contract clause. This Court found the statute unconstitutional; in doing so, it reversed the state court. This Court reasoned that the statute had not been enacted to deal with a broad, generalized economic or social problem. Furthermore, the statute did not "affect simply a temporary alteration of the contractual relationship of those within its coverage, but [instead] worked a severe, permanent and immediate change in those relationships — irrevocably and retroactively". The legislation, moreover, did not operate in an area already subject to state regulation. Finally, the Act was narrowly aimed at those who had voluntarily agreed to establish pension plans for their employees. *Id.* at 250.

The reasoning of this Court in *Allied* is applicable to this appeal. The legislation that is the subject of this appeal has as its direct aim the abrogation of State Fund's financial obligations to City and similar employers to pay cumulative trauma claims, particularly those who recently became self-insured.[11] As in *Allied*, there is no economic or social problem which justifies the abolition of contract rights. As in *Allied*, there is no emergency. As in *Allied*, the legislation "work[s] a severe, permanent and immediate change in [contractual] relationships." (*Id.*) Furthermore, more egregious than in *Allied*, the financial gain to State Fund (and loss to the City and other public agencies) is significant — over $50 million. Finally, the financial gain to State Fund is not an incidental effect of the statute; it is central.

It bears emphasis that although the loss to the insured public entities is substantial, the justification for placing the unexpected burden upon them is non-existent. The justification for this legislation is administrative convenience, *i.e.*, limiting the number of parties appearing at workers' com-

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[11]See note 9, *supra*.

pensation proceeding. That purported rationale was properly rejected by the Workers' Compensation Judge. She focused upon the fact that the State has created a monopoly for sales of insurance to public entities. Accordingly, there could never be more than two defendants. Such administrative convenience, if there were any, did not justify the outright abrogation of the City's contractual rights:

> ". . . [T]he search for insurance records of a single employer faced with a potential liability for cumulative trauma occurring during a period of fifteen or twenty years does not appear to threaten such a substantial and material harm to the people of the state as to warrant the outright destruction of rights under insurance contracts fully paid for and fully in force and effect but for such abrogation. It would appear that the legislature in providing for the single-employer exception in the earlier amendment, recognized this fact." (App. 57).

State Fund, moreover, has made no showing that there exists substantial harm to the State so as to warrant abrogation of City's insurance contracts. In fact, State Fund currently has $70 million in a contingency reserve awaiting the outcome of this and another lawsuit. (1981 Annual Report, p. 14 n. 4). In sum, there is no showing that the legislation is addressed to an emergency or that the relief provided by the statute — a windfall gain of many millions to State Fund — was required by a public emergency.

In addition, the statute is unreasonable. It does not require State Fund to return premiums paid to it for insurance by City or other insureds.[12] Furthermore, the statute does not require any return of the profit that State Fund made from investment of those premiums. To uphold legislation impairing contracts, this Court has required that the emergency be clear and the impairment limited to the nature of the

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[12]City alone paid more than 1.5 million in premiums during the period of Atkinson's employment.

emergency. For example, in *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. at 445-47, this Court recognized the conditions imposed by the legislation on enforcement of contracts, were reasonable because the contractual indebtedness continued to run and the mortgagee was still bound by the loan contract. In summary, in this case, the legislation *permanently* impaired the contracts of City and every other public entity in California without justification, emergency or otherwise.

POINT 2.

A STRICTER STANDARD OF REVIEW IS REQUIRED WHERE THE STATE IS A PARTY TO THE IMPAIRED CONTRACT THAN THAT UTILIZED BY THE CALIFORNIA SUPREME COURT.

If a State is a party to an impaired contract, the court must apply a stricter standard in reviewing legislation than if the contract is between private parties. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 97 S.Ct. 1505, 1519 (1977). One reason for this stricter standard is that because the State's own interests are involved, it cannot be assumed the State acted as a disinterested party in determining the reasonableness and necessity of the legislation. *Id.* A second rationable for such scrutiny arises from the pervasive affirmative role government now has in our society; simply put, the government must be credible:

> "For its own purposes, a government may find it convenient, sometimes indeed imperative, to signal its trustworthiness and thus to induce the sort of reliance that it could instead have spurned. When government makes that choice, a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*"

L. Tribe, *American Constitutional Law* § 9-7 (1978) (footnote omitted) (emphasis in original).

Where, as here, the State's interest is purely financial, the likelihood of abuse is great. As this Court has recognized, "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 97 S.Ct. 1505, 1519 (1977).

This Court has mandated different standards of review for courts to utilize in examining public and private contracts. In *United States Trust Co. v. New Jersey, supra*, this Court considered a bi-state compact between New York and New Jersey which created a Port Authority (Authority). The Authority issued bonds to private investors to finance its ventures which were paid through revenues derived from operation of toll bridges and tunnels. *Id.* at 4-5.

In 1962, the New Jersey and New York legislatures empowered the Authority to acquire and operate the financially troubled Hudson & Manhattan Railroad. *Id.* at 9-10. To relieve bondholder concern over this unprofitable acquisition, New York and New Jersey statutorily covenanted to limit the extent to which Authority revenues could be applied to deficits resulting from operation of the transit facilities. *Id.* at 9-10.

During the 1974 energy shortage, the legislatures of both states retroactively repealed the 1962 covenant, resulting in total abrogation of the security provision of the bonds. *Id.* at 14. United States Trust Co., a holder of and trustee for Port Authority bonds, brought suit against New Jersey alleging that the 1974 legislation repealing the covenant was an unconstitutional impairment of the obligation of contract. This Court agreed with the bondholders and found the statutory repeal violated the contract clause. *Id.* at 32.

This Court determined that the statutory repeal impaired the obligation of the states' contract since it eliminated an

important security provision of the bondholders. In determining the validity of the impairment, the Court focused upon the public nature of the contract. This Court held that if a State is a party to the impaired contract, deference to the legislative determination of reasonableness and necessity is inappropriate. *Id.* at 22-23.

In determining constitutionality of the repeal, this Court reviewed whether (1) the repeal was essential to achieve the legislative purpose and (2) less restrictive alternatives were available to the legislature. *Id.* at 29-30. The Court found that the legislature could have adopted other means to achieve its goal. In so holding, this Court rejected the State's argument that selection among alternatives is a matter solely for the State's legislative discretion: "[A] state is not completely free to consider impairing the obligations of its own contract on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment where an evident and more moderate course would serve its purposes equally well." The repeal could not be upheld as reasonable on the basis of the need for mass transit because the 1962 covenant was adopted with knowledge of those concerns. *Id.* at 31-32.

That principle has also found expression in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. at 244 n. 15. Similarly, most recently, this Court followed its decisions in *United States Trust Co.* and *Allied Structural Steel Co.* in its decision in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 51 U.S.L.W. 4106, 4109 n. 14 (1983) declaring:

> "When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. [citations] When the State is a party to the contract, 'complete deference to a legislative assessment of reasonableness and necessity is

> not appropriate because the State's self-interest is at stake.' "

Unfortunately, that principle was ignored by the state court in the instant case.

The presumption against deferring to legislative judgments in cases involving the State as a contracting party can be overcome. Unlike the case at bar, a substantial justification must be demonstrated to permit a state to disavow its obligations. For example, in *El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, *reh'g denied*, 380 U.S. 926, 85 S.Ct. 879 (1965), the state had sold public lands to finance public schools under land sale contracts. Many purchasers became delinquent on their contracts and the land was forfeited to the state and resold. Many parcels were later found to have oil and other valuable mineral rights. To stabilize the resulting land titles, Texas imposed a five year limitation for redemption of such property. Although the statute affected a purchaser's previously unlimited right to redeem, the statute was found to be constitutional because of three main factors: First, the statute eliminated disputes between private parties — successive delinquent purchasers of the same property. Second, the unlimited right to redeem was not a central part of the contract to purchase property; rather, it was peripheral. Third, the circumstances making the right to redeem of importance — a desire to speculate in mineral rights — was not foreseeable when the contracts were entered into. In contrast, in the case at bar, there is no such public interest in providing a multi-million dollar windfall to State Fund.

Similar justification for avoiding an obligation was presented in *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 62 S.Ct. 1129 (1942). As a result of economic depression, the city was bankrupt. In accordance with a state statute, it sought to reorganize its economic affairs by obtaining the consent of 85 percent of its creditors to restructure its bond debt. Thereafter, it obtained court ap-

proval of the plan agreed upon by the creditors. This Court determined that the minority of the creditors could not upset the plan. It also indicated that the contract rights of the creditors were of nominal value because of the City's bankruptcy. Accordingly, it held that the reorganization plan would not be held unconstitutional. That plan had turned a "depreciated claim of little value . . . into substantial value" *Id.* at 516. In short, no substantial contract right of the City's bond holders had been impaired. In contrast, in the case at bar, the dollar value of the City's contract right is clearly substantial. It is the State, through this legislation alone, which has depreciated City's contract rights.

The consequences of the legislative abrogation of State Fund's duty to honor its insurance contracts to City are significant. Since the claims of injured workers must be paid, the City (and other public agencies) must resort to increases in taxation although they have already paid State Fund to assume that responsibility. As recognized by this Court, "[T]he notion that a city has unlimited taxing power is, of course, an illusion." *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. at 509. The impact upon public agencies like the City caused by this legislation is substantial and unjustified.

In summary, the California Supreme Court ignored the governing standard established by this Court for reviewing such legislation. That court improperly failed to consider that the State, as a party to the contracts, had improperly repudiated its financial obligations to City for no purpose other than to increase its own coffers. If permitted to stand, the decision of the California Supreme Court would stand the contract clause on its head. It would give the State unfettered authority to "refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private

welfare of its creditors." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977). That, however, is not a justification countenanced by the Constitution.

CONCLUSION.

The appeal should be heard and the decision of the California Supreme Court be reversed.

Respectfully submitted,

ROGERS & WELLS,
By ERWIN E. ADLER,
KEGEL, TOBIN & HAMRICK,
By DAVID E. LISTER,
Attorneys for Appellant,
City of Torrance.

APPENDIX.

Order.

Supreme Court of the United States.

City of Torrance, Appellant, v. Workers' Compensation Appeals Board, etc., et al. No. A-559.

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including February 26, 1983.

William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of December, 1982.

Notice of Appeal to the Supreme Court of the United States.

In the Supreme Court of the State of California.

City of Torrance, Appellant, v. Workers' Compensation Appeals Board of the State of California; State Compensation Insurance Fund, Appellees. No. LA 31517.

Filed: December 20, 1982.

Notice is hereby given that City of Torrance, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of California, affirming the judgment entered herein on October 13, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Kegel, Tobin & Hamrick
By /s/ David E. Lister, Esq.
David E. Lister, Esq.
Counsel for Appellant,
City of Torrance

Denial of Petition for Rehearing.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

Oct. 13, 1982.

I have this day filed Order REHEARING DENIED.

In re: LA *No.* 31517, City of Torrance *vs.* W.C.A.B., State Compensation Insurance Fund.

Respectfully,

Clerk

Opinion of the California Supreme Court.

[L.A. No. 31517. Sept. 13, 1982.]

CITY OF TORRANCE, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and STATE COMPENSATION INSURANCE FUND, Respondents.

SUMMARY

A city petitioned to the Supreme Court for a writ of review after the Workers' Compensation Appeals Board granted a motion for dismissal (and denied a subsequent petition for reconsideration) made by the State Compensation Insurance Fund (State Fund), in a workers' compensation proceeding in which the city sought contribution for its settlement of a claim by the heir of a city fireman which had been brought against the city and State Fund. It had been alleged that the fireman's death had been proximately caused by a cumulative injury which had developed during the course of his employment with the city. After settling the claim, the city, which was self-insured, sought contribution from State Fund, based upon the fireman's employment during the time State Fund had insured the city for workers' compensation liability. The city based its claim on Lab. Code § 5500.5 (providing for benefits from successive employers or insurance carriers for an employee disabled by cumulative injury or occupational disease, with liability apportioned among them). However, a 1977 amendment shortened the period of exposure previously created by the statute as to prior employers and insurers, such that State Fund was not liable for any part of the fireman's claim.

The Supreme Court affirmed the board's decision. The court held that the 1977 amendment did not violate the contract clause of U.S. Const., art. I, § 10, or Cal. Const., art. I, § 9 (prohibiting the enactment of laws impairing the

obligation of contracts), although prior to the amendment the city would have been entitled to contribution from State Fund, and although the city, before becoming self-insured, had paid premiums to State Fund in return for benefits for that portion of any cumulative injury attributable to the period during which coverage was provided. In so ruling, the court held that it was the intention of the parties to incorporate subsequent changes in the law into the compensation insurance agreements. (Opinion by Bird, C. J., with Richardson, Newman, Kaus, Broussard and Reynoso, JJ., concurring. Separate dissenting opinion by Mosk, J.)

COUNSEL

Kegel, Tobin & Hamrick, Kegel & Tobin and David E. Lister for Petitioner.

John H. Larson, County Counsel (Los Angeles), Milton J. Litvin, Daniel E. McCoy, Deputy County Counsel, Kendig, Stockwell & Gleason, Eugene L. Stockwell, Jr., Owens O'Keefe Miller, John C. Shaffer, Jr., Herrick, Lundgren, Hays, Shaffer & Lancefield, James P. Jackson, City Attorney (Sacramento), and William P. Carnazzo, Deputy City Attorney, as Amici Curiae on behalf of Petitioner.

Richard W. Younkin, William B. Donohoe, Dexter W. Young, James J. Vonk, Richard A. Krimen, Michael J. Brodie, Arthur Hershenson, Fernando Da Silva and Frank Evans for Respondents.

C. Gordon Taylor, Evans, Dalbey & Cumming, Barry F. Evans and Stafford Leland as Amici Curiae on behalf of Respondent State Compensation Insurance Fund.

OPINION

BIRD, C. J.—Does the 1977 amendment to Labor Code section 5500.5, which limits the employers and compensation insurers among whom liability for cumulative injury

and occupational disease claims may be apportioned, violate the contract clause of the United States and California Constitutions?

I.

Kenneth Atkinson was employed as a fireman by the City of Torrance (City) from July 20, 1956, to April 30, 1977. For fifteen of the twenty-one years that Atkinson worked for the City, the State Compensation Insurance Fund (State Fund) was the workers' compensation insurer for the City. Since July 1, 1971, the City has not carried insurance.

On March 12, 1978, Atkinson died of lung cancer. Subsequently, his fifteen-year-old daughter Christine filed an application for workers' compensation death benefits against the City and the State Fund. Christine claimed that her father's death was proximately caused by a cumulative injury which developed during the course of his employment with the City.

After lengthy negotiations, the City settled the Atkinson claim for $28,165.49. Thereafter, contribution was sought from the State Fund for 72 percent (15/21sts) of the settlement amount. The City based its claim on section 5500.5 of the Labor Code.[1]

Section 5500.5 was enacted in 1951 to codify the rule announced by this court in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [172 P.2d 884]. (*Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 327 [152 Cal.Rptr. 459, 590 P.2d 35].) As originally enacted, the section provided that an employee claiming benefits for an occupational disease could recover against any one of the successive employers whose employment contributed

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[1]All statutory references are to the Labor Code unless otherwise indicated.

to the disease. Also, any of the successive insurance carriers that provided coverage during such employments were liable.[2] The employer or insurer held liable had the burden of seeking the apportionment of this liability among the many other responsible employers and insurers. (Stat. 1951, ch. 1741, § 1, p. 4154; see *Flesher v. Workers' Comp. Appeals Bd., supra.*)

In 1973, section 5500.5 was amended to limit liability for occupational disease or cumulative injury to the five years of employment immediately preceding either the date of injury or the last date on which the employee worked in an occupation which exposed him to the hazards which caused the occupational disease or cumulative injury. (Stats. 1973, ch. 1024, § 4, p. 2032.) Apportionment of liability to earlier years was forbidden except where "the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer . . ." (*Id.* at p. 2034.) In such circumstances, liability could be extended to "all insurers who insure[d] the . . . compensation liability of such employer, during the entire period of the employee's exposure with such employer . . . ." (*Ibid.*)[3] This provision,

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[2]Although not codified in section 5500.5 until 1973, this rule was applied to cumulative injury claims as well. (See, e.g., *Fireman's Fund Indem. Co. v. Ind. Acc. Com.* (1952) 39 Cal.2d 831, 835 [250 P.2d 148]; *Royal Globe Ins. Co. v. Industrial Acc. Com.* (1965) 63 Cal.2d 60, 63 [45 Cal.Rptr. 1, 403 P.2d 129]; see also Stats. 1973, ch. 1024, § 4, p. 2032.)

[3]The full text of this exception read as follows: "If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurers who insure the workmen's compensation liability of such employer, during the entire period of the employee's exposure with such employer, or its predecessors in interest. The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage. As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured.

"The provisions of this subdivision shal expire on July 1, 1986, unless otherwise extended by the Legislature prior to that date."

which came to be known as the "single employer exception," continued the rules which had previously been in effect for certain employers.

In 1977, the section was again revised. The 1977 amendment provided for the stepped reduction of the five-year limitation of liability to one year by 1981 and repealed the "single employer exception." (Stats. 1977, ch. 360, § 1, p. 1334.) By its terms, the amendment was applicable to all cumulative injury and occupational disease claims filed on or after January 1, 1978. (*Ibid.*)[4]

In the contribution proceedings held by the Workers' Compensation Appeals Board (Board), it was undisputed that the State Fund was liable for 72 percent of the Atkinson settlement under the provisions of section 5500.5 which were in effect prior to the 1977 amendment. It was also undisputed that if the 1977 amendment were applied, the

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[4]As amended by Statutes 1977, chapter 360, section 1, page 1334, Labor Code section 5500.5, subdivision (a) provides: "(a) Except as otherwise provided in Section 5500.6 [which applies to household employees], liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

"For claims filed or asserted on or after:	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year

". . . .

"If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years . . . ."

City, as a legally uninsured employer, was solely liable for the settlement.

Relying on the 1977 amendment, the State Fund moved for dismissal of the case. The City opposed this motion and argued that the 1977 amendment violated the state and federal prohibitions against impairment of contracts since it abrogated the State Fund's alleged preexisting contractual obligation to contribute to the settlement. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) The Board granted State Fund's motion and denied the City's subsequent petition for reconsideration. The City now seeks review of the Board's decision.

II.

This court must decide whether the 1977 repeal of the "single-employer exception" to section 5500.5 violates the contract clauses of the United States and California Constitutions.

The language of these clauses "appears unambiguously absolute . . ." (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 240 [57 L.Ed.2d 727, 733, 98 S.Ct. 2716].) "No State shall . . . pass any . . . law impairing the obligation of contracts. . . ." (U.S. Const., art. I, § 10.) "A . . . law impairing the obligation of contracts may not be passed." (Cal. Const., art. I, § 9.) Read literally, these provisions appear to proscribe any impairment. However, it has long been settled that the proscription is "not an absolute one and is not to be read with literal exactness like a mathematical formula." (*Home Bldg. & L. Assn. v. Blaisdell* (1934) 290 U.S. 398, 428 [78 L.Ed. 413, 423, 54 S.Ct. 231, 88 A.L.R. 1481].)

As the United States Supreme Court recently stated, "it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States.

'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. . . .' [Citation.] As Mr. Justice Holmes succinctly [stated] . . . 'One whose rights,such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.' " (*Allied Structural Steel, supra,* 438 U.S. at pp. 241-242 [57 L.Ed.2d at p. 734].)

Thus, a finding that the state in the exercise of its police power has abridged an existing contractual relationship does not in and of itself establish a violation of the contract clause. It is the beginning, not the end of the analysis. A finding of impairment merely moves the inquiry to the next and more difficult question—whether that impairment exceeds constitutional bounds. Obviously, if the contract clause is to have any substance, it must place some limits upon the state's exercise of the police power. (*Allied Structural Steel, supra,* 438 U.S. at p. 242 [57 L.Ed.2d at pp. 734-735].)

In applying these principles to the present case, this court's first inquiry must be whether the repeal of the "single employer exception" impaired the obligations of the City's insurance contracts with State Fund. "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them . . . ." (*Home Bldg. & L. Assn. v. Blaisdell, supra,* 290 U.S. at p. 431 [78 L.Ed. at p. 425], citing *Sturges v. Crowninshield* (1819) 17 U.S. (4 Wheat.) 122, 197-198 [4 L.Ed. 529, 549].)

The City contends that it paid the State Fund valuable consideration in the form of insurance premiums. In return, the State Fund allegedly promised to pay benefits for that portion of any cumulative injury attributable to the period during which coverage was provided to the City. It is undisputed that the repeal of the "single employer exception" to section 5500.5 operated to release to a substantial degree the State Fund from this obligation. As a result of the repeal, the State Fund was no longer obligated in every case to pay for that portion of a cumulative injury which was incurred during the time its policies were in effect.[5] Therefore, if the City's characterization of the obligation assumed by the State Fund pursuant to its insurance contracts is correct, the repeal must be found to have impaired the obligations of the City's contracts.

On closer examination, it is apparent that the City's characterization of the State Fund's obligation is not accurate. Pursuant to its insurance contracts with the City, the State Fund agreed "to pay promptly and directly to any person entitled thereto under the Work[ers'] Compensation Laws . . ., and as therein provided, any sums due for compensation . . .; to be directly and primarily liable . . . to pay the compensation, if any, for which the [City] is liable . . .; and [to] be bound by and subject to the orders, findings, decisions or awards rendered against the [City] under the Work[ers'] Compensation Laws. . . ." (See Ins. Code, §§ 11651, 11654.)

Clearly, the *only* obligation the State Fund assumed was the obligation to pay what the workers' compensation law

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[5]For example, if a worker's last injurious exposure were found to have taken place during the period that State Fund insured the City, State Fund would remain obligated to pay all or part of any compensation award under the 1977 amendment to section 5500.5. (See *ante*, fn. 4.)

required. Did this promise encompass the text of that law as it existed when the insurance contracts were made, or did the parties recognize and intend that subsequent changes in the law be applied?

Ordinarily, " ' all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into a contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.' [Citation.]" (*Alpha Beta Food Markets v. Retail Clerks Union* (1955) 45 Cal.2d 764, 771 [291 P. 2d 433]; accord *Swenson v. File* (1970) 3 Cal.3d 389, 393 [90 Cal.Rptr. 580, 475 P.2d 852]; see also *Home Bldg. & L. Assn. v. Blaisdell, supra*, 290 U.S. at pp. 429-430 [78 L.Ed. at pp. 423-424].) "[L]aws enacted subsequent to the execution of an agreement," however, "are not ordinarily deemed to become part of the agreement *unless its language clearly indicates this to have been the intention of the parties*. [Citations.]" (*Swenson v. File, supra*, at p. 393, italics added.)

In *Swenson v. File, supra*, 3 Cal.3d 389, this court spoke to this issue. The case involved a covenant in a partnership agreement which was made in 1960. The covenant provided that a retired partner would not " 'render service to a client which has its principal office within a radius of twenty miles from any partnership office which existed on the date of his retirement.' " (*Id.*, at p. 392.) When the agreement was made, this provision was invalid under section 16602 of the Business and Professions Code to the extent that it restricted a former partner from competing for clients located in areas beyond the boundaries of the cities or towns where the partnership had its offices. (*Ibid.*) A year later, that statute was revised to permit countywide restrictions. Shortly thereafter, the defendant withdrew from the partnership and went

into business in the same county. (*Id.*, at pp. 391-392.) The *Swenson* court held that the covenant could not be interpreted as incorporating the revised statute. "[T]o hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would result in modifying it without their consent, and would promote uncertainty in commercial transactions. [Citation.] We recognize that the parties could have originally agreed to incorporate subsequent changes in the law . . ., but there is no evidence that they did so in this case." (*Id.*, at pp. 394-395.)

Here, however, there is such evidence. First, the language of the agreements between the City and the State Fund clearly indicates that it was the intention of all the parties to incorporate subsequent changes in the law. "[W]hen an instrument provides that it shall be enforced according either to the law generally or to the terms of a particular . . . statute, the provision must be interpreted as meaning the law or the statute in the form in which it exists at the time of such enforcement." (14 Cal.Jur.3d, Contracts, § 173, p. 433, citing *United Bank & Trust Co. v. Brown* (1928) 203 Cal. 359, 362-363 [264 P. 482].) Moreover, at oral argument in this case, the City agreed that it was the parties' intention to incorporate subsequent changes in the law in their insurance agreements.

Since the City originally agreed to incorporate subsequent changes in the law of workers' compensation in its insurance agreements with the State Fund, it cannot complain that those changes impaired the State Fund's obligations. The City had every reason to anticipate that its rights under those agreements would change over time. It has no other legitimate contractual expectation. (Compare *Allied Structural Steel, supra*, 438 U.S. at pp. 245-246 [57 L.Ed.2d at p.

737]; see also *Veix v. Sixth Ward Assn.* (1940) 310 U.S. 32, 38 [84 L.Ed. 1061, 1065, 60 S.Ct. 792].)

The decision of the Workers' Compensation Appeals Board is affirmed.

Richardson, J., Newman, J., Kaus, J., Broussard, J., and Reynoso, J., concurred.

MOSK, J.—I dissent.

The issue in this case is whether an amendment to section 5500.5 of the Labor Code in 1977[1] results in the impairment of a workers' compensation insurance contract, in violation of the United States and California Constitutions.[2]

The workers' compensation law requires an employer to pay benefits to an employee injured as the result of continuous trauma or occupational disease incurred in the employment. Prior to the amendment of section 5500.5 in 1977, the liability for such benefits was divided among various employers (with certain limitations) in proportion to the period of time the employee was exposed to the risk in each employment. The workers' compensation insurer was liable for these pro rata benefits.

Subdivision (d) of the section provided before 1977 that if the employment was for a period longer than five years, each successive insurer of the employer during the period of cumulative injury was liable for the payment of benefits for the period during which the policy was in force. In 1977 subdivision (d) was repealed, with the result that an employer whose employee had suffered cumulative injury while a policy was in effect but who later became self-insured was required to pay compensation attributable to a period during which it had paid premiums for a policy to cover the risk of such injury.

Kenneth Atkinson died on March 12, 1978, from lung cancer. His only surviving dependent, his 15-year-old

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[1]All references are to the Labor Code, unless otherwise noted.

[2]Article I, section 10, of the United States Constitution provides, "No State shall . . . pass any . . . law impairing the obligation of contracts . . . ."

Article I, section 9, of the California Constitution similarly mandates that "A . . . law impairing the obligation of contracts may not be passed."

daughter Christine, filed an application for workers' compensation death benefits against the City of Torrance (City) and the State Compensation Insurance Fund (State Fund). She alleged that his death resulted from cumulative trauma and exposure to carcinogens during his employment by City as a fireman from July 20, 1956, through April 30, 1977. State Fund had insured City for workers' compensation liability from a time prior to 1956 through June 30, 1971. Since that date City has been self-insured. If section 5500.5, subdivision (d), had not been repealed in 1977, State Fund would have been liable for the payment of benefits for 15 of the 21 years of Atkinson's employment.

City settled the Atkinson claim for $28,165.49, reserving the right to seek contributon from State Fund, which agreed to pay 72 percent of the settlement if the 1977 amendment to section 5500.5 were held to be unconstitutional. I believe that it is unconstitutional as applied in this case.

The legislative revision of section 5500.5 in 1977 was no mere minor alteration. It accelerated reduction (through 1981) of the five-year period of employer (and insurer) liability to one year, and eliminated the "single employer exception" by repealing subdivision (d). According to the report of a legislative committee which considered the proposed amendment, the purpose of reducing the period of exposure for individual risks to one year was to permit "loss experiences to be more closely reflected in current dollars." The report went on to point out that a major consequence of the bill would be a dramatic shift of liability for cumulative injuries: "To the extent that the shift is from one insurer to another, and assuming that each has a fairly representative spectrum of risks, the net fiscal impact of enactment of [the bill] would appear relatively insignificant. To the extent that an insurer is absolved of liability in one

case, he may be presented with a larger liability on another. The net effect may be a 'wash.' "

On the other hand, "if an employer has recently become self-insured, he may be held fully liable for the payment of benefits for cumulative injury without being able to turn to a prior insurer for contribution in cases where the single employer exception applies. Opponents argue that since they paid their premium on an 'occurrence' basis and are entitled to contribution under existing law, it would be unfair for the Legislature to absolve those workers' compensation insurers of liability and shift that loss to the self-insured employer."

As to the financial amounts involved in this shift, the report stated: "The exact amount . . . is not known but it has been estimated by the insurance industry to be approximately $52.7 million for the period of 1978 through 1981. Of this amount, it is estimated that $15.3 million will be shifted to private self-insurers and $37.4 million shifted to public agencies." The analysis concluded that "the greatest fiscal impact appears to be on those public agencies who were formerly covered by the State [Fund]." (Assem. Com. on Finance, Insurance and Commerce, Interim Hgs. on Assem. Bill No. 155 (Apr. 27, 1977) p. 4.) That, of course, is the predicament of the City of Torrance.

The first step in determining the merit of City's assertion that the deletion of the "single employer exception" results in an unconstitutional impairment of its contract with State Fund is to decide whether the policy covered the injury sustained by Atkinson. The policy, in accordance with provisions of law, required State Fund to be "liable to employees . . . or in the event of death, to their dependents, to pay the compensation . . . for which the insured is

liable."[3] Since City was liable for "cumulative trauma" suffered by its employees, it follows that State Fund also incurred such liability.

State Fund contends, however, that the repeal of the "single employer exception" in 1977 did not affect its obligation to provide benefits for injuries which occurred during the time its policy was in force. That is, it argues, since a cumulative injury occurs when the employee first suffers disability and knows that the disability is caused by his employment (§§ 3208.1, 5412), Atkinson was not injured while State Fund insured City, but thereafter, while City was self-insured. Thus, the 1977 amendment only deprived City of its right to seek contribution for the portion of the injury sustained by Atkinson during the time the State Fund policy was in effect.

But the rule that liability for cumulative injuries must be apportioned among successive employers and their insurers has long prevailed in this state (e.g., *Royal Globe Ins. Co. v. Industrial Acc. Com.* (1965) 63 Cal.2d 60, 64 [45 Cal.Rptr. 1, 403 P.2d 129]), and the parties are presumed to have recognized its existence at the time they entered into the insurance contract. Thus, the premiums paid by City to State Fund during the period the policy was in effect were based on the assumption that State Fund would be liable for any portion of a cumulative injury incurred by City's employees during the period of policy coverage even though the employee's disability may not have occurred until a later time. It is clear, therefore, that the parties had bound themselves to a contract which, at the time it was made, and until the amendment of section 5500.5 in 1977,

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[3]Section 11651 of the Insurance Code provides that every contract of workers' compensation insurance shall provide that the insurer will be liable for payment of compensation for which the employer is liable, subject to the provisions of the policy.

obligated State Fund to reimburse City for its apportioned share of cumulative trauma claims.

State Fund argues that a workers' compensation contract is subject to policy considerations and that the Legislature may, by statute, affect the rights of the parties under such a contract. In support of this assertion, it cites cases from California and other jurisdictions, and points to the fact that the policy of insurance provided that it was to be governed by the workers' compensation laws. The majority opinion leans heavily on that proposition.

But the cases relied upon for this proposition are inapposite. In *Argonaut Mining Co. v. Ind. Acc. Com.* (1951) 104 Cal.App.2d 27 [230 P.2d 637], between the time the decedent had incurred a cumulative injury and the date of his death in 1948, the Legislature had increased the benefits payable to an employee. The employer claimed that the award of compensation on the basis of rates in effect in 1948 impaired the obligation of its contract with the deceased employee because at the time of hire the parties "dealt in contemplation" of the statutes in existence when the injury was incurred and those statutes had become an integral part of the employment contract. It was held that the right to workers' compensation was not founded upon contract, but upon statutory rights and duties arising from the employer-employee relationship, and that such rights are imposed by the law as incidents of that status. (See also *McAllister v. Bd. of Education* (1963) 79 N.J. Super. 249 [191 A.2d 212, 218]; *Schmidt v. Wolf Contracting Co.* (1945) 269 App.Div. 201 [55 N.Y.S.2d 162, 167-168].)

In the present case, however, the issue is not the liability of an employer for compensation to his employee, but whether the state may by statute relieve an insurer of its obligation to indemnify the employer for a risk which the insurer had agreed to bear and for which the employer had

paid premiums.[4] Obviously, the relationship of an employer to its workers' compensation carrier is fundamentally contractual in nature. Efforts by the Legislature to affect that relationship are subject to constitutional limitations.

Since the 1977 legislation relieved State Fund of obligations it would have had prior to the amendment, the elimination of the "single employer exception" amounted to an impairment of contract. Admittedly not every contractual impairment violates the constitutional mandate; under some circumstances impairment has been held to be justified.

The seminal case in contract clause analysis is *Home Building and Loan Assn. v. Blaisdell* (1934) 290 U.S. 398 [78 L.Ed. 413, 54 S.Ct. 231, 88 A.L.R. 1481], in which the United States Supreme Court upheld a state act that placed a moratorium on foreclosures during the Great Depression. To justify the impairment of contractual obligations in that case, the court found four factors to be significant: (1) an emergency existed, as declared by the Legislature; (2) the legislation was addressed to a legitimate end—the protection of basic interests of society—and was not enacted for the advantage of particular individuals; (3) the legislative changes were appropriate to the emergency and were based on reasonable conditions; and (4) the legislation was temporary in operation and limited to the emergency. (*Id.* at pp. 444-447 [78 L.Ed. at pp. 432-433].)

In later cases, the high court has discussed additional factors to be considered in determining whether an impairment violates the Constitution. Governmental acts are sub-

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[4]Nor does *State of California v. Industrial Accident Commission* (1959) 175 Cal.App.2d 674 [346 P.2d 861], support State Fund's position. There, the Legislature repealed a statute giving insurers a right of contribution from the Subsequent Injuries Fund under some circumstances—a right which was purely statutory rather than contractual in nature.

ject to a stricter level of scrutiny when a "substantial impairment" is found. In such a situation, a "careful examination of the nature and purpose of the state legislation" must be conducted, keeping in mind that "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244-245 [57 L.Ed.2d 727, 736-737].)

Another circumstance which calls for stringent review is if the legislation modifies the government's own financial obligations. The deference traditionally given to a legislative assessment of reasonableness and necessity is not appropriate in that circumstance "because the State's self-interest is at stake." (*United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 26 [52 L.Ed.2d 92, 112, 97 S.Ct. 1505]; *Sonoma County Organization of Public Employees v. County of Somona* (1979) 23 Cal.3d 296, 310 [152 Cal.Rptr. 903, 591 P.2d 1] [hereinafter *Sonoma County*]; see *Fletcher v. Peck* (1810) 10 U.S. (6 Cranch) 87 [3 L.Ed. 162].)

In applying these standards to the contract in question, we must first decide whether the state was attempting to modify its own obligations. While the state itself is not a party to this proceeding, the State Fund, an autonomous state agency, is involved. Organized and established by the Legislature in 1914, pursuant to the provisions of article XX, section 21, of the California Constitution, the State Fund has been regulated and supervised directly since that time by the state Insurance Commissioner. (*See Gilmore v. State Comp. Ins. Fund* (1937) 23 Cal.App.2d 325, 329 [73 P.2d 640].) Sections 11770 through 11881 of the Insurance Code provide extensive rules regulating the organization, powers, rates, policies, reports and other rights and duties of the State Fund. The board of directors of the State Fund is appointed by the Governor (*id.*, § 11770), and its em-

ployees are civil servants. Furthermore, the State Fund is authorized to receive specific appropriations from the Legislature. (*Id.*, § 11773.) This relationship between the state and State Fund makes the state a direct beneficiary of the 1977 legislative changes, and heightens the level of scrutiny that we must apply.

The case for stricter scrutiny is buttressed if the contractual impairment is determined to be severe. In *Allied Structural Steel* the high court invalidated Minnesota's Private Pension Benefits Protection Act when it found its effect on contractual obligations severe. There a basic term of the pension contract was retroactively modified. The court stressed the element of reliance as a key ingredient in measuring severity, particularly in the context of pension and insurance funds. " 'These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contribution charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. *Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect.*' " (Italics added.) (*Allied Structural Steel Co. v. Spannaus, supra*, 438 U.S. at pp. 246-247 [57 L.Ed.2d at p. 738], quoting from *Los Angeles Dept. of Water & Power v. Manhart* (1978) 435 U.S. 702, 721 [55 L.Ed.2d 657, 673, 98 S.Ct. 1370].)

As was the case in *Allied Structural Steel*, the statutory changes which removed the single employer exception in 1977 "nullifie[d] express terms" of the State Fund's contractual obligations with the City and "impose[d] a com-

pletely unexpected liability in potentially disabling amounts." (*Id.*, at p. 247 [57 L.Ed.2d at p. 738].) When the City became self-insured in 1971, it reasonably and justifiably relied on State Fund's honoring its contractual commitments, including the incurred but not reported loss reserve to cover anticipated cumulative trauma claims. The law in effect at that time mandated that State Fund be responsible for such future claims, and that law was part of the contract by which to measure the obligations of the parties. This has been made clear in every California case on the subject. (See, e.g., *Interinsurance Exchange v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142 [23 Cal.Rptr. 592, 373 P.2d 640]; *Alphs Beta Food Markets v. Retail Clerks* (1955) 45 Cal.2d 764, 771 [291 P.2d 433] (cert. den. 350 U.S. 996 [100 L.Ed. 861, 76 S.Ct. 547]); *Bell v. Minor* (1948) 88 Cal.App.2d 879, 881 [199 P.2d 718].) Thus, the 1977 changes attempted to shift unforeseen and formidable liabilities to the City, the severity of which in terms of millions of dollars cannot be doubted.

Accordingly, in applying the *Blaisdell* factors to this case we should observe stricter scrutiny because *the contractual impairment is severe and the state is attempting to modify its own obligations.*

The first part of the *Blaisdell* test—a legislative declaration of emergency—is a "threshold" hurdle that the state must overcome. (*Sonoma County, supra*, 23 Cal.3d at p. 312.) In *Sonoma County* the Legislature had specifically included a declaration of fiscal emergency, but we found insufficient factual evidence to support such a conclusion. In the case before us, there is nothing in the record to indicate that an emergency justified the repeal. Analysis of the other *Blaisdell* criteria adds no more support to State Fund's position.

The remaining factors of the analysis require a showing that the legislation was enacted to protect basic interests of society, were based on reasonable conditions, and were temporary in duration. The legislative acts here, as those in *Allied Structural Steel*, were not enacted to deal with a broad, generalized economic or social problem. (See *Allied Structural Steel, supra*, 438 U.S. at p. 245 [57 L.Ed.2d at pp. 736-737].) Moreover, the cost shift effected by the legislation was total and irrevocable rather than merely temporary in nature.

State Fund and amicus curiae urge that the 1977 revisions were necessary to "streamline procedures" and "reduce litigation costs and delay." As to the effect on litigation, however, there is no showing that the "single employer exception" had any negative impact on an applicant's ability to obtain benefits in a just and expeditious fashion. And the need to "streamline procedures" is obviously insufficient to justify the severe impairment which occurred here. The streamlining for State Fund is at the expense of a substantial burden upon the City.

The board and State Fund claim that the 1977 legislation was justified as an exercise of the police power; they suggest that when the state acts under this plenary power, contractual obligations can be impaired at will. It is of course true that the contract clause does not obliterate the police power of the state. (*Allied Structural Steel, supra*, 438 U.S. at p. 241 [57 L.Ed.2d at p. 734].) We have pointed out that "The state's police power remains paramount, for a legislative body 'cannot "bargain away the public health or the public morals." ' " (*Sonoma County, supra*, 23 Cal.3d at p. 305, quoting from *Blaisdell, supra*, 290 U.S. at p. 436 [78 L.Ed. at p. 428].) However, it is equally true that "if the contract clause is to have any effect, it must limit the exercise of the police power to some degree." (*Sonoma County, supra*, 23

Cal.3d at p. 305.) In my view the Legislature exceeded the limits of its power here.

I would hold that section 5500.5 is unconstitutional insofar as it relieves State Fund of its obligation to pay death benefits attributable to Atkinson's employment during the time it provided workers' compensation insurance to City. I would annul the board's decision.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

City of Torrance, Petitioner vs. Workers' Compensation Appeals Board of the State of California; State Compensation Insurance Fund, Respondents. Civil No. 59479. (WCAB No. 78 MON 20351).

Filed: October 27, 1981.

PETITION for Writ of Review of a decision by the Workers' Compensation Appeals Board. Affirmed.

Kegel, Tobin & Hamrick and David E. Lister for Petitioner.

James P. Jackson, John H. Larson, Milton J. Litvin, Daniel E. McCoy, Kendig, Stockwell & Gleason, Eugene L. Stockwell, Jr., Owens O'Keefe Miller, Herrick, Lundgren, Hays, Shaffer & Lancefield and John C. Shaffer, Jr., as Amici Curiae on behalf of Petitioner.

Richard W. Younkin, William B. Donohoe and Dexter W. Young for Respondent Workers' Compensation Appeals Board.

Vonk, Krimen, Hershenson & Evans and Frank Evans for Respondent State Compensation Insurance Fund.

Evans, Dalbey & Cumming, Barry F. Evans, Stafford Leland and C. Gordon Taylor as Amici Curiae on behalf of Respondents.

The sole issue here is whether certain portions of the amendments to Labor Code section 5500.5 by Statutes 1977, chapter 360, section 1, page 1334, are an unconstitutional impairment of contract under article I, section 10 of the

United States Constitution[1] and article I, section 9 of the California Constitution.[2]

This proceeding arises out of a claim by the heir of Kenneth Atkinson, who died on March 12, 1978, allegedly as the result of repetitive and cumulative trauma and exposures during his employment by the City of Torrance as a fireman from July 20, 1956, through April 30, 1977. The Atkinson petition joined the City and the State Compensation Insurance Fund as defendants. The State Fund had insured the City for workers' compensation liability from a time prior to July 20, 1956, through June 30, 1971. Since that time the City has been self-insured.

The City settled the Atkinson claim for a cash payment of $28,165.49, reserving the right to seek contribution from the Fund, which agreed that it would pay 72% of the total if the 1977 amendment were held to be unconstitutional.

The Fund made a motion for dismissal upon the ground that its coverage of the City of Torrance ended prior to July 1, 1971, and that under the 1977 amendment to Labor Code section 5500.5, it was not liable for any part of the Atkinson claim. The Worker's Compensation Appeals Board granted the motion and dismissed the State Fund. The City then filed its petition in this court to review that order of dismissal.

We first review the development of the law on this subject in order to place the issue in its context.

In *Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 327, the Supreme Court outlined the earlier history of section 5500.5:

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[1]"No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . ." (U.S. Const., art I, § 10.)

[2]"A bill of attainer, ex post facto law, or law impairing the obligation of contracts may not be passed." (Cal. Const., art. I, § 9.)

"[Labor Code] Section 5500.5 was enacted in 1951 to codify the rule announced in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79, 82 [172 P.2d 884], that an employee disabled by a progressive occupational disease may obtain an award for his entire disability against any one or more of his successive employers or insurance carriers and that those held liable have the burden of seeking apportionment. [Citations.] Originally, section 5500.5 was limited by its express language to occupational disease claims, but its procedures were applied by analogy to cumulative injury claims as well. [Citations.] In 1973, section 5500.5 was amended to expressly cover cumulative injury as well as occupational disease claims. (Stats. 1973, ch. 1024, § 4, p. 2032.)"

Prior to the 1973 amendments, section 5500.5 authorized joinder of every employer with whom the employee had been exposed to the hazards of the occupational disease; and the Worker's Compensation Appeals Board was required to apportion the liability among them. When a single employer had been insured by successive insurers during the period of exposure, liability was apportioned among them. (See *Royal Globe Ins. Co. v. Industrial Acc. Com.* (1965) 63 Cal.2d 60, 63.)

This system, which was unlike that used in most other states, (see 4 Larson, Workmen's Compensation Law (1981) § 95.21, pp. 17-79), created a procedural morass, as employers, insurers and their attorneys embarked on the task of tracing employment and insurance into the remote past. The 1973 amendment to section 5500.5 sought to ameliorate these problems by limiting liability for occupational disease or cumulative injury to those who had employed the worker during the five years immediately preceding the injury or the last date of hazardous employment, subject to an exception, commonly known as the single

employer rule, which is of particular interest in this case. That exception was in subdivision (d) of section 5500.5, which read as follows:

> "(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurers who insure the workers' compensation liability of such employer, during the entire perid of the employee's exposure with such employer, or its predecessors in interest. The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage. As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured.
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> "The provisions of this subdivision shall expire on July 1, 1986, unless otherwise extended by the Legislature prior to that date." (Stats. 1973, ch. 1024, § 4, p. 2032.)

The 1977 amendments to section 5500.5 provided that the liability period would be reduced annually until January 1, 1981, when the liability period for cumulative trauma and occupational disease claims would be only one year.[3]

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[3]As amended by Statutes 1977, chapter 360, section 1, page 1334, Labor Code section 5500.5, subdivision (a) provides: "(a) Except as otherwise provided in Section 5500.6 [which applies to household employees], liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the

(footnote continued on following page)

The 1977 amendments also eliminated the one-employer rule of subdivision (d).

The 1977 amendment of section 5500.5 provides in subdivision (i): "The amendments to this section adopted at the 1977 Regular Session of the Legislature shall apply to any claims for benefits under this division which are filed or asserted on or after January 1, 1978, unless otherwise specified in this section."

The claim involved here was filed April 10, 1978, and the 1977 amendment is, by its terms, the applicable law. Under this statute the City of Torrance as a self-insurer is liable for the full amount of the award. Under the statutes which had been in effect prior to the operation of the 1977 amendment, the City would have been entitled to contribution from the State Fund, as an insurer during a portion of the time the employee had been exposed to the hazardous employment.

Before enacting the 1977 change in law, the Legislature had before it a report from the Assembly Finance, Insurance and Commerce Committee on Assembly Bill 155, which contained these amendments. The report explained "The

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next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

For claims filed or asserted on or after:	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year

". . . .

"If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining such liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment."

function of the amendments to Labor Code section 5500.5 is to shorten the period of exposure for individual risks to one year thereby permitting loss experience to be more closely reflected in current dollars. The amendment is tantamount to converting a workers' compensation insurance policy from an 'occurrence' basis to a 'claims made' basis."

The report went on to point out that one of the consequences of the bill would be a shift of liability. The report stated: "To the extent that the shift is from one insurer to another, and assuming that each has a fairly representative spectrum of risks, the net fiscal impact of enactment of Assembly Bill 155 would appear relatively insignificant. To the extent that an insurer is absolved of liability in one case, he may be presented with a larger liability on another. The net effect may be a 'wash.' [¶] On the other hand, however, if an employer has recently become self-insured, he may be held fully liable for the payment of benefits for cumulative injury without being able to turn to a prior insurer for contribution in cases where the single employer exception applies. Opponents argue that since they paid their premium on an 'occurrence' basis and are entitled to contribution under existing law, it would be unfair for the Legislature to absolve those worker compensation insurers of liability and shift that loss to the self-insured employer. The exact amount of this shift is not known but it has been estimated by the insurance industry to be approximately $52.7 million for the period of 1978 through 1981."

It is this shift which is the basis of the City's contention that the 1977 amendment impaired the obligation of a contract. From 1956 to 1971 the City paid insurance premiums to the State Fund, during which time the law required the cost of a cumulative injury to be shared by all who had insured the City during any part of fireman Atkinson's exposure. The effect of the 1977 amendment was to relieve

the Fund of that potential liability. Before discussing the City's contention, we must examine the nature of the relationship between the parties involved in workers' compensation.

The duty of any employer to provide compensation for an injured employee arises from the California Constitution and the statutes enacted to carry out the constitutional mandate. Section 4 of article XIV of the state Constitution provides: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party."

Pursuant to that constitutional provision, and its predecessors dating back to 1911, the Legislature has created a system of compensation which has been revised and amended from time to time as the Legislature deems appropriate. One of the features of that system is, and long has been, that the employer must either be insured by a duly qualified insurer against liability to pay compensation or must qualify as a self-insurer by establishing its ability to administer and pay workers' compensation claims. (Lab. Code, § 3700.)

The insurance policy under which State Fund insured the City of Torrance during the period ending June 30, 1971, is attached to the City's petition to the Workers' Compensation Appeals Board for reconsideration. The policy, in substance, requires the insurer to pay what the law requires

to be paid under the Workers' Compensation Law.[4] This is the coverage which the law requires. (Ins. Code, §§ 11651, 11654.) It is not disputed that the period covered by the policy terminated on June 30, 1971, long before Atkinson's death.

We turn now to a consideration of what effect the change of law after the expiration of the policy period has upon the relationship between the State Fund and the City.

In carrying out its constitutional mandate to provide a system of workers' compensation insurance which makes "adequate provisions for the comfort, health and safety and general welfare" of workers and their dependants, the Legislature needs to modify the system from time to time. The evolution of social and economic conditions and the teaching of experience impel continual reexamination of the compensation system.

As changes in substantive and procedural law occur, whether by legislative enactment or judicial interpretation,

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[4]The policy states: "State Compensation Insurance Fund . . . does hereby agree . . . (1) To pay promptly and directly to any person entitled thereto under the Workmen's Compensation Laws of the State of California, and as therein provided, any sums due for compensation for injuries, and for the reasonable cost of medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, apparatus and artificial members; to be directly and primarily liable to employees covered by this Policy, or in the event of their death, to their dependents, to pay the compensation, if any, for which the Insured is liable (except the increase in any award imposed under Labor Code section 4553 and 4557, or both, for serious and wilful misconduct of the employer or for injury to an employee under sixteen years of age and illegally employed at time of injury); and, as between the employees and the Fund, the notice to or knowledge of the occurrence of an injury on the part of the Insured shall be deemed notice or knowledge, as the case may be, on the part of the Fund; and jurisdicton of the Insured shall, for the purpose of the law, be jurisdicton of the Fund; and the Fund shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the Insured under the provisions of the Workmen's Compensation Laws of the State of California . . . ."

some impact upon the insurer's risk is inevitable. A few examples will illustrate this truism.

The Legislature has from time to time changed the rate of compensation for disability; and it has long been recognized that the measure of compensation is governed by the law in force at the time the employee sustains an industrially caused disability. Thus in *Argonaut Mining Co. v. Ind. Acc. Com.* (1951) 104 Cal.App.2d 27, a disability occurring in 1948 as a result of exposure to silica hazards between 1923 and 1928 was held compensable under the statutes in effect in 1948. The employer contended that this result violated the contract impairment clauses of the California and federal Constitutions, arguing that the statutes in existence at the time of employment were a part of the contract of employment. The Court of Appeal rejected that argument, pointing out that the employer's duty to pay compensation was not contractual but statutory; and that the applicable rate was that which the law provided at the time the right to compensation came into existence. The court said at page 31: "Regardless of the date of exposure to disease, the claimant has no cause of action and no rights accrue to him until that point in time when the cumulative effects of his disease result in a compensable disability. It would seem that the law then in effect should govern the claimant's rights."

In *State of California v. Industrial Accident Commission* (1959) 175 Cal.App.2d 674, the employer and its compensation carrier were awarded partial indemnification from the California Subsequent Injuries Fund under a provision of Labor Code section 5500.5 which was then in force. While the state's proceeding to review that award was pending in the Court of Appeal, legislation deleting that provision of section 5500.5 went into effect, together with a legislative declaration that the deletion should apply retrospectively to

any cases pending before the Commission or the courts. Accordingly, the Court of Appeal ordered the Commission to annul the indemnification award.

The development of the law with respect to progressive occupational disease and cumulative trauma itself illustrates the impact of changes in the law upon the risks to which compensation insurers and self-insurers have been exposed.

It was decisional law, based on interpretation of pre-existing general statutes, that developed the concept that the employee disabled by occupational disease might, at his option, obtain an award for the entire disability against any one of successive employers or successive insurance carriers, who might then seek contribution from the other employers or carriers. (See *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79.) The impact of such a rule upon the liability of compensation carriers and self-insurers is obvious.

In 1951 that rule was codified in Labor Code section 5500.5.

Although section 5500.5 originally referred only to occupational disease, the courts interpreted that language as including cumulative traumas. (See *Freuhauf Corp. v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 569, 576.)

The 1973 amendment, discussed above, shifted liability from carriers whose policies had been in force during the earlier period to insurers who covered the last five years.

In *Harrison v. Workmen's Comp. Appeals Bd.* (1974) 44 Cal.App.3d 197 the issue was whether the five-year limitation applied to a pending case in which the injury had occurred prior to the effective date of the 1973 amendment. The court recognized that applying the amendment retrospectively might substantially affect the rights and liabilities of the employers who came within the five-year period.

Nevertheless, the court concluded that the Legislature intended the amendment to apply retrospectively, and accordingly, the court affirmed the Board's order dismissing those insurance carriers which had not provided insurance within five years prior to the date of injury.

In *Flescher v. Worker's Comp. Appeals Bd., supra*, 23 Cal.3d 322, the Supreme Court was required to interpret the five-year limitation in the 1973 amendment. In that case the worker had been disabled by cumulative injuries sustained in employment by several employers between 1934 and 1973. The Board interpreted the 1973 amendment as meaning that compensation for the cumulative injury was limited to the portion sustained during the five years immediately preceding the time he became disabled. The Supreme Court reversed, pointing out that the 1973 amendment did not limit the time period for which the worker might recover, but limited only the employers and insurance carriers who could be held liable. It does not appear that the constitutionality of the 1973 statutory shift of liability was raised in that case.

The development of workers' compensation law in this state and the principles discussed and applied in the cases cited above bring us to these conclusions:

Although the relationship between the employer and the compensation insurer is contractual in origin, the scope of the insurer's liability is established by law. In particular, the terms and conditions of compensation payable to the injured worker or his survivors are as determined by the Legislature and are subject to change by legislative action.

In the operation of this compensation system, the time when the employee was exposed to hazard does not necessarily determine which employer or insurer will be liable for the payments required by statute. Nor does the law in

effect at the time of the employee's exposure necessarily determine the amount payable. Development of the law relating to compensation for occupational disease and cumulative trauma has from time to time imposed upon insurers and self-insurers liabilities of a kind and magnitude not known when the obligation was undertaken. Those liabilities were incurred because the insurers and self-insurers were obligated to pay what the law required as compensation and medical care for the disabled employee. The possibility of changes in the applicable law has become a part of the risk assumed by the compensation carriers and the self-insurers.

The feature of the current law to which the City objects is simply the repeal of a provision which would have enabled the City to seek contribution from an insurer whose period of coverage expired June 30, 1971. That provision was repealed because of problems which it had raised, particularly the difficulty of establishing proper rates and adequate reserves for the incurred-but-not-reported liabilities which had been accruing. This change is consistent with the constitutional mandate to create a complete and effective system of compensation.

The change in law which relieved State Fund of an obligation which would have existed under the prior law, does not in any sense impair the obligation of any contract.

The order of the Board is affirmed.

CERTIFIED FOR PUBLICATION.

FILES, P.J.

We concur:

KINGSLEY, J.

McCLOSKY, J.

Opinion and Order Granting Reconsideration and Decision After Reconsideration.

Workers' Compensation Appeals Board, State of California.

Kenneth V. Atkinson, Deceased, Christine L. Atkinson, Daughter, by and through her Guardian ad Litem and Trustee, Terry Atkinson, Applicant, vs. City of Torrance, legally uninsured, Defendants. Case No. 78 MON 20351.

On November 29, 1979, defendant State Compensation Insurance Fund petitioned for reconsideration on the Findings, Award and Order of November 6, 1979, whereby its Motion for Dismissal was denied and it was found, inter alia, that the principal amount of the Compromise and Release between defendant City, legally uninsured, and applicant was reasonable, with defendant City awarded contribution against petitioner. Petitioner contends, in substance, that the workers' compensation judge erred in failing to grant its motion for dismissal (1) because it did not insure the employer within four or five years of the date relevant to determination of liability pursuant to Labor Code Section 5500.5(a), and (2) because the single employer exception of the Labor Code Section 5500.5(d), in effect before January 1, 1978, did not apply as there was a second employer, Hughes Aircraft Company, or (3) because the amendment to Labor Code Section 5500.5, effective January 1, 1978, which leaves out the single employer exception, is constitutional.

Based on our review of the record, including the following, reconsideration shall be granted to dismiss petitioner as a party defendant.

Labor Code Section 5500.5, effective January 1, 1978, provides in relevant part, as follows:

"(a) . . . liability for occupational disease or cumulative injury claims *filed or asserted on or after January 1, 1978*, shall be limited to those employers who employed the employee during a period of *four* years immediately preceding either *the date of injury*, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first . . ." (Emphasis Added)

Such section further provided for the eventual shortening of the period relevant to liability to one year. Up until such effective date, by the 1973 amendment, that period was five years. As the claim herein involves a cumulative injury, and it was filed after January 1, 1978, the later amendment applies. (See *Rountree v. Time, D.C., et al* (En Banc) (1979), 44 CCC 223.)

Labor Code Section 5412 provides as follows:

"The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee *first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.*" (Emphasis Added)

Before January 1, 1978, Labor Code Section 5500.5(d) provided in relevant part, as follows:

"(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for *more than five years with the same employer*, or its predecessors in interest, *the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable.* Liability in such circumstances shall extend to all insurers who insure the workmen's compensation liability of such employer, during the entire period of the

employee's exposure with such employer, or its predecessors in interest. *The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage.* As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured." (Emphasis Added)

By the 1977 amendments of Labor Code Section 5500.5, effective January 1, 1978, the single employer exception was dropped.

Our review of the record does not reveal that applicant either knew of his industrial disability or was last harmfully exposed within four (or five) years of petitioner's period of coverage. As the single employer exception is not in effect, petitioner was not a liable carrier and shall be dismissed as a party defendant. See *Santa Cruz v. WCAB (White)*, 44 CCC 1041.

The entire period of harmful cumulative exposure is considered when determining the injured employee's disability. (See *Flesher v. WCAB* (1979), 44 CCC 212.) The four year period is relevant only for determination of the respective liability of defendants. The convenience of considering only four years rather than the entire cumulative exposure and of not using the single employer exception of Labor Code Section 5500.5(d) in effect prior to January 1, 1978, does not deprive the remaining parties or party, of due process or equal protection of the law. (Cf. *Harrison v. WCAB* (1974), 39 CCC 857.)

In *Harrison*, the Court gave retroactive effect to the 1973 amendments to Labor Code Section 5500.5. In affirming the Appeals Board's decision, the Court noted as follows:

"The board also concedes that if the amendment is applied retrospectively, the rights and liabilities of employers who remain in the litigation may be sub-

stantially affected. This is so because, through application of the new statute, some employers who might otherwise have been found liable for contribution will escape liability, thus diminishing the amounts the remaining employers may recover by way of contribution.

"The board contends, however, that retrospective application of the new statute will not directly enlarge the liability of the employers and carriers involved. Whereas they may be required to assume a larger burden in some cases, yet in other cases these same employers and carriers will be absolved from any liability even though their employments may have contributed, in some degree, to an employee's ultimate disability . . . [*Harrison*, supra at p. 871]

* * *

"In light of the legislative history of the section and all other pertinent factors presented to us by the board, we do not find it difficult, in this instance, to ascertain and identify the intent of the Legislature, charged as it is with a constitutional duty to provide a workmen's compensation system which 'shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character . . .' (California Const., art. XX Section 21.) We agree with the board's opinion that the amended legislation was designed and introduced for the purpose of ameliorating the procedural morass which has faced the board in multiple defendant cases. Thus, it is clear that the purpose of the amendment was to remedy an immediate situation which was imposing undue delay and expense upon litigants and hardship upon disabled employees . . ." [*Harrison*, supra at p. 873]

The shortening of the relevant liability period in subsection (a) from five years to eventually one year, and the dropping of the single employer exception of the previous

subsection (d), by the amendment effective January 1, 1978, address the same needs as did the 1973 amendments approved by the Court in *Harrison*.

In her Opinion on Decision, the workers' compensation judge found that the later amendment to subsection (a) was consistent with *Harrison*, but that the dropping of the single employer exception was not. She opined as follows:

> "Where the harmful employment was with a single employer for more than five years, an exception was provided which permitted the solely liable employer to receive the benefit of insurance policies it had purchased covering the employment in question. Where the harmful employment is with a single employer over a period of more than five years, why should the employer be required to pay the entire claim itself? Why should the employer be precluded from collecting on the policies of insurance it bought and paid for to cover just such a liability accruing during the earlier years? To arbitrarily cut off such contract rights would indeed appear to deprive the insured of its property without due process of law.
>
> * * *
>
> "The amendment of Section 5500.5 effective 1/1/78, by failing to include the single-employer exception, would operate in this case as an *unjustifiable impairment of the obligation of the City's insurance contracts with State Fund* for the earlier years of the cumulative trauma claim herein." (Emphasis Added)

We do not agree. Aside from whether or not any impairment was justified for the reasons discussed in *Harrison*, it has not been established that there has been any impairment. Our review of the record does not reveal that the relevant contracts are in evidence. We must assume that by such contracts all petitioner agreed to was to insure defendant City's compensation liability for injuries occurring

during those years. It cannot be said that petitioner agreed to contribute to liability occurring after it was off the risk.

Even if defendant City had a right to contribution from petitioner by reason of the previous subsection (d), such right was not of common law origin and was not vested, but inchoate. When subsection (d) was not included in the amendment effective January 1, 1978, defendant lost its right to contribution, thereon based, for any matter where the claim was filed after such effective date. (Cf. *Subsequent Injuries Fund v. IAC (Koski)* (1959), 24 CCC 279, 281.)

As the amendments to Labor Code Section 5500.5 effective January 1, 1978, are constitutional, we need not discuss whether or not the Board has the jurisdiction to find a statute unconstitutional, or whether there was a second employer, herein.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration filed November 29, 1979, be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED that the Findings, Award and Order of November 6, 1979, be, and it is hereby, RESCINDED and the following Finding and Order substituted therefor as the Decision After Reconsideration of the Workers' Compensation Appeals Board.

FINDING OF FACT

1. State Compensation Insurance Fund is not a necessary party defendant herein.

ORDER

IT IS ORDERED that the motion of State Compensation Insurance Fund for dismissal as a party defendant herein be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED that State Compensation Insurance Fund be, and it is hereby, DISMISSED as a party defendant herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Robert E. Burton

I CONCUR.

/s/ C. L. Swezey

/s/ Richard Younkin, Deputy

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA. Jan. 28, 1980

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD.

/s/ Patricia W. Domingo

[Seal] Workers' Compensation Appeals Board.

Report and Recommendation on Reconsideration.

CASE: 78 MON 20351

Kenneth V. Atkinson, Deceased; Christine Atkinson, Daughter by and thru her Guardian at Litem and Trustee, vs. City of Torrance, legally uninsured and State Compensation Insurance Fund.

Romaine Harper, Workers' Compensation Judge.

Date of Injury: 7/20/56 - 4 30/77.

December 7, 1979.

Memel, Jacobs, Pierno & Gersh, by Stanley K. Jacobs Attorneys for Applicant.

Robert T. Hjelle, Attorney for State Compensation Fund.

Kegel & Tobin, by David E. Lister, for City of Torrance.

I

INTRODUCTION

In this cumulative trauma case involving only one employer, the State Compensation Insurance Fund moved for dismissal under *Labor Code* Section 5500.5, as amended effective January 1, 1978. If granted, the motion will limit liability to the last four years of employment, during which the employer was legally uninsured. The legal uninsured objected to the dismissal on the ground that the amendment is unconstitutional; that is, by leaving out the single-employer exception, the statute impairs the obligation of insurance contracts between the uninsured and the State Compensation Insurance Fund during the earlier years of the decedent's employment.

The applicant settled with the legal uninsured, and the settlement was approved by order dated June 4, 1979. The uninsured and the State Fund appeared upon the same date and stipulated that the principal amount of the Compromise

and Release is reasonable and that the State Fund agrees to contribute 72% thereof in the event its motion for dismissal is denied. Time was allowed for the parties to file Points and Authorities, the case thereafter to be submitted upon the issues of adequacy of Compromise and Release and motion of State Fund for dismissal.

On November 6, 1979 Findings and Award and Order issued finding that State Fund is a necessary party defendant herein, that the principal amount of the Compromise and Release is reasonable and that the contributive share of the State Fund is 72% (the share of costs being found at 50%).

Motion of State Fund for dismissal as a party defendant was denied and Award was issued in favor of the City of Torrance, legally uninsured, from which State Fund has filed a timely Petition for Reconsideration on the three usual statutory grounds.

II
JURISDICTION

Petitioners cite Article III, sub-section 3.5, of the *California Constitution*, at page 9, lines 20-27, and page 10, lines 1-7, of the petition. While not referred to in the briefs of the parties at the trial level, this Constitutional provision would appear to be determinative if the Workers' Compensation Appeals Board is an administrative agency. The provision reads as set forth in the Petition for Reconsideration, with some minor exceptions of capitalization and punctuation. According to the pocket part in West's Annotated California Constitution, the sub-section was proposed as an addition by Assembly Constitutional Amendment No. 25, 1977-78, and was approved by the people at the primary election held June 6, 1978. There are no annotations.

The Section provides that an administrative agency has no power to declare a statute unconstitutional (Cal. Const. Article III, Sec. 3.5, Sub-Sec. (b)).

Petitioner contends that the board is an administrative body and cites cases holding that the board has no power outside of those vested by the Constitution and the Workers' Compensation Act. The Act is said to be liberally construed and the Board vested with wide powers to the end that justice may be done in all cases.

Petitioner concedes that the board is "a court in legal effect" whose powers, however, must be exercised within the express powers granted by the Constitution and statute limiting jurisdiction (Petition, page 13, lines 19-24).

In its trial brief on jurisdiction, the legal uninsured argues that the board, as a court, has authority to determine constitutionality of a statute and has done so, citing a 1978 *Attorney General's Opinion*, 61 OPS. ATT. GEN. 46 on page 1 and several cases on pages 2 and 3 of Supplemental Brief of City of Torrance Re: Jurisdiction filed August 27, 1979. One of the citations is erroneous, and the case has not been found. In some of the cases, the Court of Appeal is ruling on constitutionality of a statute as applied by the Board.

The only case cited which seems to speak directly to the point is a Writ denied case, which is not properly cited under the rules of court. It is *Caress and Sons vs. WCAB*, 42 CCC 442, dated prior to the primary election held June 6, 1978 approving addition of Section 3.5 to Article III of the California Constitution. (In *Caress*, the Board issued a decision limiting liability to five years under Labor Code Section 5500.5, but defendant petitioned for reconsideration on the ground, inter alia, of denial of due process and equal

protection of the laws, the Board denied reconsideration and the Court of Appeal denied the petition for Writ of Review.)

The courts have long held that the board is a constitutional court which, in matters within its jurisdiction, acts as a judicial body and exercises judicial functions (see *Slotten vs City of Santa Monica*, 43 CCC 188 at 196, citing *Solari vs. Atlas-Universal Service, Inc.*, 215 Cal.App.2d 587, 28 CCC 277). These decisions precede the June 6, 1978 election referred to hereinabove.

The issue would seem to be whether the board is only a constitutional court of limited jurisdiction or is, at the same time, an administrative agency. If it is an administrative agency, then it "has no power . . . to declare a statute unconstitutional . . ." since the June 6, 1978 addition of Section 3.5 to Article III of the California Constitution. No definition of administrative agency per se is found in the Petition or the Points and Authorities, but Petitioner refers to Article IV, Sec. 4 of the California Constitution granting the Legislature power to vest jurisdiction over a workman's compensation program in an administrative body (Petition, page 7, line 23) and to provide for settlement of compensation disputes by an industrial accident commission (Id. page 8, lines 8-9). Petitioner also refers to Article III, Sec. 1, of the California Constitution providing for division of powers of government into legislative, executive and judicial departments and for separation of those powers (Id. page 9, lines 1-12).

III
CONSTITUTIONALITY

Petitioner contends the supplemental brief filed by the uninsured was untimely and should not have been considered (Id. page 23, lines 15-18). It is believed that the filing of this brief is within the discretion of the Board.

Petitioner argues that *Labor Code* Section 5500.5, as amended effective January 1, 1978, does not impair any contract between the uninsured and petitioner, since the uninsured terminated the insurance effective July 1, 1971, and the contractual obligations of petitioner arise only upon the filing or assertion of a claim (Id. page 26, lines 1-13). This is inferred to refer to the fact that this claim was not raised until the application was filed on April 10, 1978. Since the injury is for cumulative trauma commencing in 1956, this argument is believed to be without merit.

Petitioner argues it is well established that a statute is presumed to be constitutional (Id. page 14, lines 13).

Petitioner argues that the Legislature, after having considered the purposes and effect of the statute, enacted it to simplify and streamline compensation proceedings (Id. page 16) and that it affects all concerned equally (Id. pages 18-19 citing *Harrison vs. WCAB*, 44 Cal App 3d at 873).

Petitioner recognizes the constitutional principle that a statute may impair the obligation of contract if there is a compelling state purpose and argues that such purpose exists in cumulative trauma cases and is served by the statute (Id. pages 19 and 20, lines 1-2).

Petitioner distinguishes the case of *Sonoma County Organization of Public Employees vs. County of Sonoma*, 23 Cal. 3d 296, cited in the uninsured's trial brief commencing at page 11, line 24 (Id. pages 20-21), wherein the California Supreme Court found a prohibition against the distribution of State surplus funds to local public agencies who granted their employees salary increases in excess of that provided for State employees did impair the obligation of contracts between the public employers and their employees. "The court held the impact of the statute on the contract rights of the employees was severe, and the government agencies

did not meet their burden of establishing the existence of a fiscal crisis on which they relied for justification of the impairment" (Id. page 20, lines 16-20).

Petitioner argues that the statute in *Sonoma County* directly attacked the employment contracts, while the amendment to Labor Code Section 5500.5 does not, as it does not alter or extinguish any liability with regard to *specific* injury but merely affects the period of liability for *cumulative* injuries (emphasis by judge).

The judge agreed with the uninsured that the amendment, only by virtue of leaving out the single-employer exception, deprived the City of the benefit of the insurance contracts on which it had paid premiums and which undertook to cover its liability in just such claims as the present one. No such obligation of contract would appear to exist where there is more than one employer in a cumulative trauma claim, as the Labor Code then limits the liability of the *employer*. If the employer has no liability, then the employer has no claim against its insurance company.

The procedural difficulties inherent in a cumulative injury case with multiple employers would not seem to exist in any comparable degree where there has been only one employer. Ordinarily, employers would have records of their insurance carriers over the years, while employees may very well lose employment records and forget some of their past employments.

IV
PROCEDURAL MATTERS

Petitioner contends that the constitutionality of the amendment limiting liability to four years is moot, for if it is declared unconstitutional, the five year limitation of liability would apply and petitioner would still be excluded (Petition, page 22, lines 16-27, and page 23, lines 1-13).

This argument proceeds upon the assumption that there are two employers involved in this case, the City of Torrance and Hughes Aircraft Company. The fact is, however, that the only defendant employer is the City of Torrance. No motion for joinder of Hughes Aircraft Company is found in the record, although the informal minutes of January 15, 1979 ("appearance sheet") contains the handwritten note by the judge, "Note: Hughes Aircraft may have to be joined. Applicant may have moonlighted there."

Petitioner next contends that the award of contribution was without due process of law because at no time has the uninsured filed a petition for contribution (Id. page 25). This argument would appear to have no merit in view of the stipulations entered into by the uninsured and the State Fund on the record on June 4, 1979 (reasonableness of principal amount of compromise and release and agreement of State Fund to contribute 72% in the event its motion for dismissal as a party defendant is denied).

RECOMMENDATION: If the board is an "administrative agency" within the meaning of California Constitution Article III, Section 3.5, then it no longer has power to declare a statute unconstitutional, if it ever did. The status of the Appeals Board as an administrative agency has not been briefed by the parties. Therefore, no recommendation is made.

Respectfully submitted,

/s/ Romaine Harper
ROMAINE HARPER
Workers' Compensation Judge

RH/gh

Opinion on Findings and Award and Order.

CASE: 78 MON 020351

Kenneth V. Atkinson, Deceased; Christine L. Atkinson, Daughter, vs. City of Torrance, legally uninsured and State Compensation Insurance Fund.

Romaine Harper, Workers' Compensation Judge.

Date of Injury: 7/20/56-4/30/77.

November 5, 1979

Applicant daughter filed cumulative injury claim contending that her father died as a result of cumulative trauma arising out of his employment as a fireman from July 20, 1956 through April 30, 1977. The employer, City of Torrance (hereinafter "City"), was insured for workers' compensation liability by State Compensation Insurance Fund (hereinafter "State Fund") from 1956 through June 30, 1971 and was legally uninsured from July 1, 1971 through April 30, 1977.

The uninsured and the applicant entered into a compromise and release for $28,165.49, which has been approved as adequate. City and State Fund stipulated that the compromise and release figure was reasonable and that State Fund would contribute its pro-rata share of 72% in the event contribution was awarded. The case was submitted on the motion of State Fund for dismissal as a party defendant under *Labor Code* Section 5500.5 and opposition thereto by the City on the ground of alleged unconstitutionality of the 1977 amendment to *Labor Code* Section* 5500.5 eliminating the single-employer exception to the shortening of the period of liability for cumulative trauma.

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*All references herein to statute refer to the California Labor Code unless otherwise specified.

Prior to the amendment, the section limited liability for cumulative trauma to the last five years of exposure, unless the employee had worked for only one employer for more than five years, in which event all the different insurance carriers of that one employer would be liable. The amendment shortening the time to four years for claims filed in 1978 eliminated the single-employer exception.

State Fund has challenged jurisdiction of the appeals board to declare a statute unconstitutional, arguing that the separation of powers doctrine precluded this, because the appeals board is an arm of the executive branch of the government, while only the judicial branch has power to decide constitutionality.

The City contends that the appeals board has such jurisdiction (see Supplemental Brief of City of Torrance re Jurisdiction and cases cited therein).

Under the 1978 amendment liability would be limited to the last four years of exposure even though the decedent worked for only one employer throughout his employment as a fireman. If the application of the statute here is unconstitutional, then the single-employer exception incorporated into the statute before its amendment would apply, and all carriers of the City of Torrance during the decedent's employment would be liable.

Section 5303 provides, "There is but one cause of action for each injury . . . All claims . . . arising out of such injury may . . . be joined in the same proceedings . . ."

Section 5300(a) provides that proceedings for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto, shall be instituted before the appeals board and not elsewhere, (with exception not here pertinent). Thus, the appeals board has jurisdiction over the City's claim for contribution from the State Fund.

Section 133 provides, "The Division of Industrial Accidents, including the Administrative Director and the Appeals Board, shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this Code."

Section 5310 provides that the Administrative Director may appoint general referees, who shall have the powers, jurisdiction and authority granted by law . . ."

Under the Sections cited, there would appear to be jurisdiction in the appeals board to declare the amendment of Section 5500.5, to the extent that it eliminates the single-employer exception, unconstitutional.

As pointed out in the brief of the City, Article I, Section 10 of the United States Constitution provides that no state may pass any law impairing the obligation of contract. The elimination of the single-employer exception, the City argues, impairs the obligation of the insurance contracts between it and the State Fund in the first fifteen years of the decedent's employment, contracts on valuable consideration consisting of the premiums paid. The City argues about the tremendous shift of liability to "single-employers" who initially bought workers' compensation insurance and then became self-insured or legally uninsured, the greatest fiscal impact appearing to be on public employers formerly covered by State Fund (see page 7 of Trial Brief of Defendant City of Torrance).

As pointed out in the United States Supreme Court cases cited by the City, a state law may impair the obligation of a contract if it is reasonably necessary to do so to serve an important public purpose.

The California Court of Appeal, First Appellate District, in *Harrison v. WCAB* (1974), 44 Cal.App.3d 197, 118 Cal.Rptr. 508, 39 CCC 867, found the earlier version of

Section 5500.5 limiting liability to the last five years of employment (except where there was a single-employer) to be reasonably necessary to prevent the expenditure of "time, effort, and money in tracing the applicant's employment history over the entire course of his adult life . . . (as) . . . bankrupt or disolved firms, and record destruction would often make this job difficult if not impossible." (39 CCC at 868).

Quoting further from the *Harrison* case, "Tracing insurance coverage for the many employers who might be involved in such claims presented virtually impossible tasks for the agency and for the parties involved in the claim. When a claim involving multiple employers and carriers finally reached the hearing stage, proceedings were often grossly encumbered by milling numbers of attorneys in the corridors and hearing rooms representing the numerous carriers and employers for the suit, each of whom had the right to appear to cross-examine the applicant and his witnesses." (39 CCC at 869).

Section 5500.5 was amended effective January 1, 1977 to limit liability for cumulative trauma to the last five years in order to facilitate discovery of employers and carriers and eliminate the appearance of hordes of attorneys representing them. The procedural problems referred to in *Harrison*, supra, prevented the speedy determination of the rights and liabilities of the parties mandated by *Cal Const. Art. XX, Sec. 21*. Substantive liabilities were changed; but it was thought that the overall liability of the various workers' compensation carriers would "even up" with the experience of a quantity of cases. No reason appears to doubt this prediction.

This shifting of liability to the employers during the last five years facilitated settlements and speeded disposition of cases and receipt of benefits by applicants. No impairment

of contract was involved. The earlier employers had no liability to the employee. As insureds, they had no loss; and so their carriers had no duty under the insurance contracts to pay.

Even though the liability for cumulative trauma was limited to the last five years, the entire period of employment was and is material to the issue of whether an injury has taken place. The last five years of so-called microtraumata might not have caused disability without the accumulated stresses and strains of the preceding years.

Where the harmful employment was with a single employer for more than five years, an exception was provided which permitted the solely liable employer to receive the benefit of insurance policies it had purchased covering the employment in question. Where the harmful employment is with a single employer over a period of more than five years, why should the employer be required to pay the entire claim itself? Why should the employer be precluded from collecting on the policies of insurance it bought and paid for to cover just such a liability accruing during the earlier years? To arbitrarily cut off such contract rights would indeed appear to deprive the insured of its property without due process of law.

It *is* due process of law, however, for the state to abrogate contract rights if the legislature has made a reasonable determination that an evil exists causing material harm to the public and the statute provides a reasonable means of correcting that evil and affects all in the same situation equally. The January 1, 1978 amendment to *Section* 5500.5 would appear reasonable in limiting liability to the last four years, then three, they two, etc. If it facilitates justice and speedy compensation to get rid of a horrendous procedural morass, then it must still be good to whittle down the procedural difficulties more and more.

Still, the search for insurance records of a single employer faced with a potential liability for cumulative trauma occurring during a period of fifteen or twenty years does not appear to threaten such a substantial and material harm to the people of the state as to warrant the outright destruction of rights under insurance contracts fully paid for and fully in force and effect but for such abrogation.* It would appear that the legislature, in providing for the single-employer exception in the earlier amendment, recognized this fact.

The amendment of *Section* 5500.5 effective 1/1/78, by failing to include the single-employer exception, would operate in this case as an unjustifiable impairment of the obligation of the City's insurance contracts with State Fund for the earlier years of the cumulative trauma claim herein.

Accordingly, the motion of State Fund for dismissal as a party defendant herein will be denied and Findings and Award for Contribution will issue commensurate with the stipulations of the City and State Fund entered in the minutes of June 4, 1979 herein.

/s/ Romaine Harper
ROMAINE HARPER
Workers' Compensation Judge

RH/gh

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*Even if multiple carriers are involved, the single-employer should have his business records to identify them and settlements should not be deterred. By election against a carrier or uninsured, delay and hordes of attorneys may be avoided. The real difficulty for an employee traumatized by a long career of stressful employment was remembering and locating his many employers.

Findings and Award and Order.

Workers' Compensation Appeals Board, State of California.

Kenneth V. Atkinson, Deceased; Christine L. Atkinson, Daughter, by and through her Guardian ad Litem and Trustee, Terry Atkinson, *Applicant*, vs. City of Torrance, legally uninsured and State Compensation Insurance Fund, *Defendant*. Case No. 78 MON 20351.

Filed: November 13, 1979.

Applicant and the City of Torrance, legally uninsured, having filed Compromise and Release which was approved by Order of 6/4/79; State Compensation Insurance Fund having moved for dismissal herein under *Labor Code Sec.* 5500.5, as amended effective 1/1/78; and City of Torrance, legally uninsured, and State Compensation Insurance Fund having appeared and entered certain stipulation into the record; the Honorable ROMAINE HARPER, Workers' Compensation Judge, now finds, awards, and orders as follows:

FINDINGS OF FACT

1. State Compensation Insurance Fund is a necessary party defendant hereto.

2. The principal amount of the Compromise and Release herein between the City of Torrance, legally uninsured, and the applicant of $28,165.49 is reasonable.

3. The contributive share of State Compensation Insurance Fund herein for death benefits, burial expense and self-procured medical expense is 72%, or $19,550.38.

4. The contributive share of State Compensation Insurance Fund herein for medical-legal expenses for Reuben R. Merliss, M.D. and Memel, Jacobs, Pierno & Gersh is 50%, or $506.10.

5. The contributive share of State Compensation Insurance Fund herein for medical defense costs for appearance of Dr. Wandling herein on June 4, 1979 is 50%.

ORDER

IT IS ORDERED that motion of State Compensation Insurance Fund for dismissal as a party defendant herein be, and it hereby is, denied.

AWARD

AWARD IS MADE in favor of the City of Torrance, legally uninsured against State Compensation Insurance Fund of $19,550.38 plus $506.10 plus 50% of the costs for appearance of Dr. Wandling on June 4, 1979 herein, all payable forthwith.

Dated at SANTA MONICA, CALIFORNIA

NOVEMBER 6, 1979

/s/ Romaine Harper
ROMAINE HARPER
Workers' Compensation Judge

Declaration of David E. Lister.

I, David E. Lister, being deposed under penalty of perjury, do certify and say:

1. I am an attorney licensed to practice before all the courts of the State of California. I am a member of Messrs. Kegel, Tobin & Hamrick and represented the City at the oral argument before the California Supreme Court in the case which is presently on appeal to this Court.

2. The agreement between City and State Fund was the subject of extensive discussion at oral argument in the California Supreme Court. The Court questioned me, among other things, about changes in applicable compensation rates for injured workmen (For example, in 1981, the specified rate for the weekly maximum temporary disability rate was changed from $154 per week to $175.) I indicated changes in compensation benefits between the employer and employee was contemplated by the agreement. I did not indicate at the oral argument or in the briefs that the State could modify a different contractual arrangement, *i.e.* State Fund's contractual obligations to City of Torrance.

3. After reading the opinion of the California Supreme Court, I concluded that there could be an ambiguity in respect to the nature of the contractual changes agreed upon by the City. It was possible to construe the opinion as indicating that I had stated that the City had agreed to any and all possible changes in the Workers' Compensation Act. To clarify that possible ambiguity, we filed a petition for rehearing which was denied on October 13, 1982.

4. Subsequent to the denial of the petition for rehearing, I made efforts to obtain access to the tape recording of the oral argument to clarify that ambiguity. I requested permission to hear that tape personally and to have a certified shorthand reporter make a transcription of it. In response

to that request, I received a telephone call from Mr. Gill, Clerk of the Court, who advised me that the court would not permit any stenographic transcription of the tape. I confirmed that representation of Mr. Gill with my letter to him dated January 6, 1983.

5. On February 16, 1983, I was granted permission to listen to the tape recording and did so on February 23, 1983. All of the court's questions and my responses are set forth below in *haec verba* in connection with the issue whether the City had agreed to accept changes in the terms of its agreement with State Fund. Consistent with my recollection, except for changes in compensation benefit rates and types of injuries covered, there was no concession that the City agreed to accept any changes unilaterally imposed by the State. The questions and answers were as follows as copied from the tape:

> Q [Justice Newman]: What does the phrase mean "under the workman's compensation law and as therein provided" — are you saying that does not contemplate amendments?
>
> A [Mr. Lister]: It contemplates all kinds of amendments — increases in rates, increases in kinds of injuries that are found compensable. Legislation can increase rates without impairing contracts. Law cannot tamper with or abrogate rights of parties to private contracts — *the duty of the insurance company to its insured . . . exists despite amendments in other aspects of worker's compensation law.*
>
> Q [Justice Newman]: What is your authority for that proposition?
>
> A [Mr. Lister]: Our understanding of the federal and state constitution contract clauses. [emphasis added.]

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of February, 1983 at Los Angeles, California.

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David E. Lister